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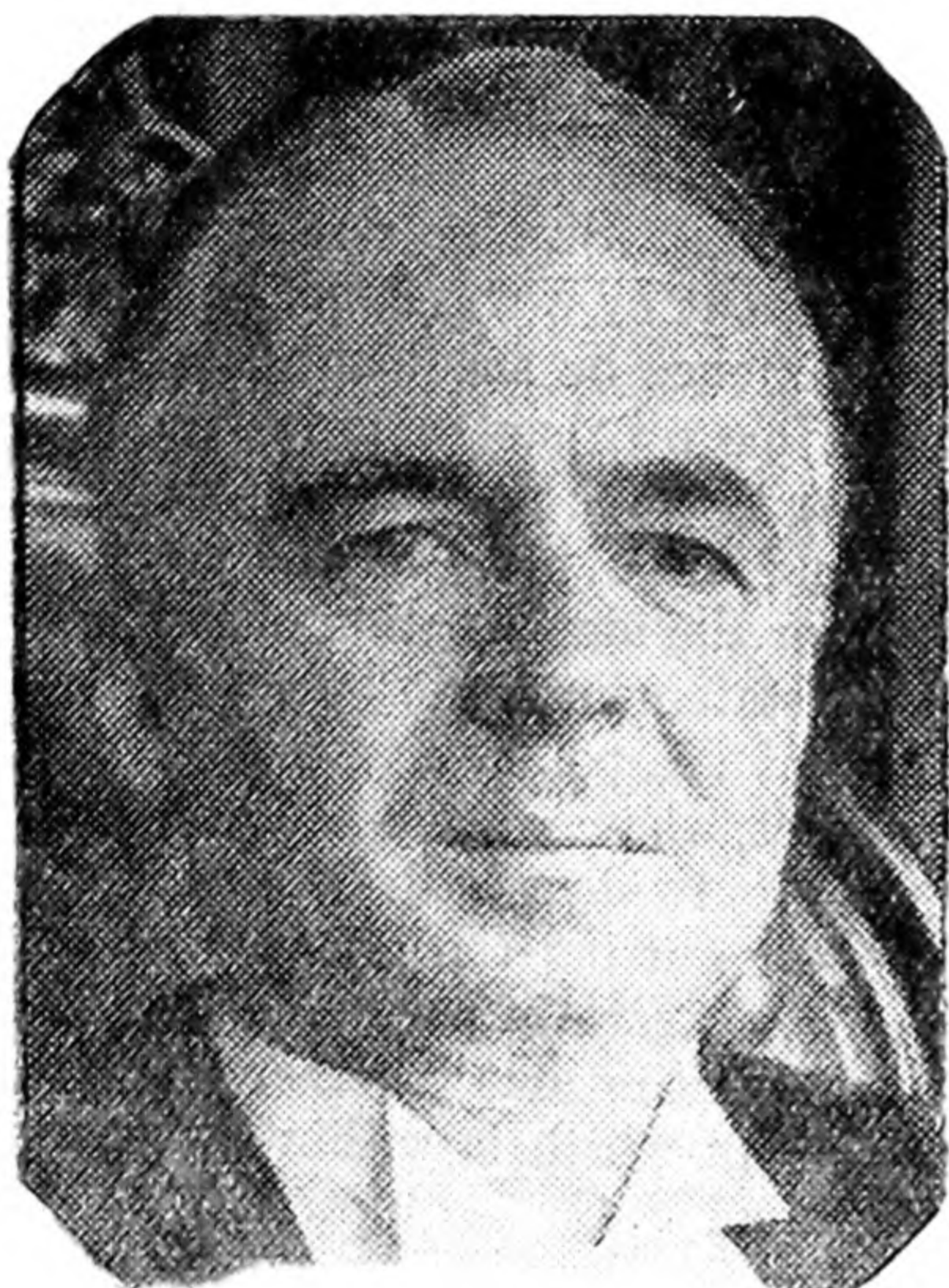
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THE ALL INDIA REPORTER 1944 JOURNAL SECTION

THE HON'BLE SIR LEONARD STONE CHIEF JUSTICE OF THE BOMBAY HIGH COURT



By courtesy of "Bombay Sentinel."

SIR LEONARD STONE, who is the youngest Chief Justice that has ever presided over the Bombay High Court after Sir Lawrence Jenkins, was born in November 1896. He belongs to a family of distinguished lawyers. His grand-father, Mr. Thomas Stone was a well-known solicitor, and his father Mr. John Morris Stone practised with distinction at the Chancery Bar. He received his early education at Malvern College and when the last Great War broke out he joined the colours in 1914 and served in the 29th Division in the Gallipoli campaign. From 1919 to 1922 he held several staff and administrative appointments in the Near East. After the War, he studied for the law and was called to the bar in 1923. He read in Chambers with Mr. R. A. Willes the well-known common-law lawyer for one year, and he thereafter read in Chambers with his father. He acted as Judge's Marshall to a number of Judges including the late Mr. Justice Avory. He became a member of the Lincoln's Inn in 1930 and he represented Gray's Inn on the Joint Committee of the Four Inns of Court until his appointment as Chief Justice of the Bombay High Court and his departure for India. After the outbreak of the present World War Sir Leonard became an active member of the Home Guard and was awarded the O. B. E. (Military Division) for his services.

While practising at the bar, Sir Leonard built up very soon a flourishing practice on the Chancery Side and achieved a distinct position. He had the honour of practising in the same Division as Sir Alfred Spens, now the Chief Justice of India. It is a remarkable coincidence that both the Chief Justices of India and Bombay took charge of their exalted offices in the same year. The following are a few of the more important cases in which Sir Leonard appeared as counsel: *Wolstanton Ltd. and Attorney-General of Duchy of Lancaster v. New Castle-under Lyme Corporation*, 1940 A. C. 860 (House of Lords); *The Canadian Pacific Rly. Co. v. Lockhart*, 1942 A. C. 591; *International Rly. Co. v. Naigara Parks Commission*, 1941 A. C. 328; *In re Diplock*; *Wintle v. Diplock*, (1941) 1 Ch. 253; *Attorney-General v. Wimbledon Corporation*, (1940) 1 Ch. 180; *In re Smith Bosanquet*; *Smith v. Smith Bosanquet*, (1940) 1 Ch. 954.

It is expected on all hands that he will uphold the highest and best traditions of his exalted office and we respectfully wish him every success.

by V. S. RAJU, I.C.S., *District Judge, Ahmednagar.*

It is usual for the prosecution in criminal trials to adduce evidence of identification of offenders by witnesses at identification parades held by the police in the course of investigation, evidence of identification of stolen property by the owner in the course of police investigation, evidence of identification of foot-prints of the offender by an ordinary or expert witness in the course of police investigation and evidence of identification of places by witnesses in the course of police investigation. But all such evidence, it is submitted, is inadmissible on behalf of the prosecution under S. 162, Criminal P. C., and also not relevant under the Indian Evidence Act.

It makes no difference to the question of relevancy or admissibility whether at the time of a witness identifying an offender the police show him one or ten persons. If evidence of identification parades is at all admissible, such evidence would be admissible even if there is only one person in the parade, namely, the accused.

In the course of police investigation, a number of persons including the suspected offender or offenders are made to stand in a row by the police in the presence of panchas or mashirs and the prosecution witness is asked to identify the person whom he had seen committing the offence or at the scene of offence. The witness then points out one or more persons from the row. This is recorded in a panchnama or mashirnama. Evidence of identification is generally given by the identifying witness as well as by the police investigating officer who held the identification parade and by the panchas present at the identification. But all such evidence is inadmissible under S. 162, Criminal P. C. If it is a statement made to the police in the course of investigation neither the person to whom the statement is made nor the person who made the statement nor a person in whose presence the statement was made can give evidence of the statement. It is the statement that is rendered inadmissible by S. 162, by whomsoever it is attempted to be proved.

The question is whether such evidence does not amount to a statement made to the police in the course of investigation. Even a mere pointing out amounts to a statement. Statements can be made even by gestures. The effect of the pointing out is the same as if the witness had said: "This is the man whom I saw committing the offence;" or "This is the man whom I saw at the scene of offence

immediately after the commission of the offence." If he does not expressly say so to the panchas, it amounts to an implied statement to the same effect; because mere pointing out by itself has no meaning. If it is only intended to put in evidence the fact of pointing out, then it would not be clear why the man was pointed out by the witness. But the witness may have pointed him out to say that he had seen him near the village well or that he had sold a piece of land to him or that the person pointed out is on inimical terms with the victim of the offence, etc. The mere pointing out would convey no meaning at all. It is the pointing out in answer to the question put to him to identify the man whom he had seen committing the offence or at the scene of offence that conveys any meaning. Similar remarks apply to the pointing out by a witness of a place as the scene of offence or the identification of an article as his own stolen property. It is therefore clear that the pointing out a person as the offender, of a place as the scene of offence, etc., or the identification of property is an implied statement made by the witness in the course of the police investigation. As a matter of fact, what happens is that a question is put to him to identify the person whom he had seen committing the offence and the witness points out certain person. The question and the pointing out together form an implied statement which is within the scope of S. 162, Criminal P. C.: *see* 19 A. L. J. 947.¹

The identification by a prosecution witness differs little from a statement made by him. Let us take the case of an eye-witness to a murder committed by two persons F and G, of whom F is known to him but not G. The police in the course of investigation call the witness and ask him who committed the offence. The witness tells the police that the offence was committed by F and another person not known to him. This statement to the police is clearly inadmissible as a statement made to the police in the course of investigation. In order to discover the second offender, the police hold an identification parade before the witness who picks out G. This procedure is to be adopted because the witness does not know the name of the offender, but it has the same effect as giving the name of the offender in the other case. The effect in both the cases is to make a statement fixing the identity of the offender.

1. ('21) 8 A. I. R. 1921 All. 215 : 95 I. C. 477 : 27 Cr. L. J. 813 : 19 A. L. J. 947, *Nagina v. Emperor*.

In one of the cases the identity of the person is fixed by giving the name of the offender who is known to the witness and that is sufficient to fix the identity. In the second case, as the name is not known the identity is fixed by pointing him out. Or to take another illustration: supposing that in the course of the police investigation the police ask an eye-witness to an offence committed by H, who the offender was. He tells the police that he knows the name of the offender but that at the moment he does not remember the name. The police officer then proceeds to read out a number of names A, B, C, D, E, etc., and tells him that he should raise his hand when he hears the name of the offender read; when the police officer comes to the name of H the witness raises his hand. The effect in all these cases is the same. All are statements made to the police in the course of investigation fixing the identity of the offender and are inadmissible under S. 162.

In A. I. R. 1934 Lah. 692² it was held that the presence of a police constable in the room where the identification parade is held is objectionable.

In A. I. R. 1936 Pesh. 166³ at p. 168 Middleton J. C. observed as follows:

"The question whether a witness has or has not identified a man during the investigation is not one which is in itself relevant at the trial. Such parades should be held as a check upon the veracity of people who are believed to know something about the matter. The actual evidence regarding identification is that which is given by the witnesses in Court. It will not be strengthened by proof of the facts that they alleged recognition of an accused at a parade held during the investigation, though, on the other hand, its value will be destroyed if it is shown that they have ever failed to identify the accused prior to the trial."

In 54 Bom. 528⁴ it was impliedly held that in places where S. 162 in the amended form is in force, evidence both oral and written of identification at parades held by police would be inadmissible. They seem to have impliedly held that written evidence, that is, panch-namas of identification parades held by police would be inadmissible even in Bombay where S. 162, Criminal P. C., is not in force.

In 62 Cal. 918⁵ it was held that the statement express or implied made by way of identifying an accused is hit by the provisions

of S. 162, Criminal P. C. It is submitted with great respect that the decision in A. I. R. 1929 Nag. 36⁶ where it was held that evidence of identification parades is admissible as a statement of an actual fact or circumstance seen and observed by a witness is not sound. If this decision lays down correct law, then the provisions of S. 162, Criminal P. C., can be easily rendered nugatory.

In the course of police investigation when a police officer is recording the statement of a prosecution witness, the police officer can put a question to the witness, "Who is the offender?" and if the witness points out the offender who is then in the presence of both, can it be held that this evidence is admissible on the ground that it is only a pointing out of the offender by the witness; what difference does it make to the question of admissibility, whether the witness points out the offender while he is standing alone or while he is standing in a row of persons? It would be absurd to argue that the pointing out by a witness of an offender while standing in a row of persons is admissible, while such a pointing out of an offender standing alone is inadmissible. Identification parades are held in order to satisfy the investigating officer of the bona fides of the prosecution witnesses. But the fact that the police are satisfied about the evidence is irrelevant at the trial.

Some may argue that the statement is not made to the police in the course of the investigation but to the panchas who are present at the time of the identification parade. In the course of the investigation police officers may ask panchas to record statements of witnesses in their presence and it can be argued that a statement by a witness is merely a statement made to the panchas and every statement made in the course of police investigation would have to be admitted in evidence notwithstanding the provisions of S. 162, Criminal P. C.

The provisions of S. 162 may be circumvented by leading evidence in the following manner:

(1) The witness may depose that he saw the offender at the place where the identification parade had been held by the police in the course of investigation;

(2) that the offender was then in a row of persons;

(3) that the offender stood at a particular number in that row, e. g., fourth from the right;

(4) the police officer who held the identifica-

6. ('29) 16 A. I. R. 1929 Nag. 36 : 112 I. C. 51 : 29 Cr. L. J. 963, Ramadhin v. Emperor.

2. ('34) 21 A.I.R.1934 Lah. 692: 155 I.C. 263 : 36 Cr.L.J.679: 35 P.L.R.744, Kartar Singh v. Emperor.

3. ('36) 23 A. I. R. 1936 Pesh. 166 : 164 I. C. 578 : 37 Cr. L. J. 981, Mohammed Hussain v. Emperor.

4. ('30) 17 A. I. R. 1930 Bom. 158 : 126 I. C. 333 : 54 Bom. 528 : 31 Cr. L. J. 1003 : 32 Bom. L. R. 327, Emperor v. Wahiduddin Hamiduddin (No. 2).

5. ('35) 22 A.I.R. 1935 Cal. 311 : 158 I. C. 843 : 36 Cr. L. J. 1470 : 62 Cal. 918 : 39 C. W. N. 488, Krishna Chandra v. Emperor.

tion parade or a panch present at the identification parade may depose that the person who stood at that number in the row at the identification parade was the accused.

But evidence of identification of an offender by a witness in the course of a police investigation cannot be given indirectly in this manner for the rule is that what cannot be done directly cannot be done indirectly: I.L.R. (1943) Mad. 737,⁷ 47 C. W. N. 757⁸ and A. I. R. 1943 Pat. 346.⁹

I submit also that none of these four facts is relevant under the Indian Evidence Act.

That a witness saw a person or the offender at the police station or at any other place where the parade had been held by the police is certainly not relevant under any of the provisions of the Indian Evidence Act. The parade may have been held long after the commission of the offences. Even if it had been held soon after the commission of the offences, there is no rule of evidence that if a witness sees the offender a few days after the offence evidence can be given of such a fact. It is not necessary for Courts to know what witnesses do in the course of police investigation except for contradicting the evidence of such witnesses. What witnesses did in the course of police investigation is not relevant under the Indian Evidence Act. That evidence of identification in police investigation is irrelevant has been held in A. I. R. 1936 Pesh. 166.³ The conduct or acts of a witness subsequent to the commission of an offence are nowhere made relevant. There can be no doubt whatsoever that the facts that when the witness saw the offender the offender was standing in a row of persons and was standing at a particular number in that row are irrelevant. Similarly the evidence of a panch witness or a police officer as to the identity of any of the persons who stood in the row is irrelevant. The presence of the accused in the row is also irrelevant because it is the police who made him stand in the row.

The fact that a witness saw the offender subsequent to the completion of the offence is, as I have already shown, irrelevant except perhaps in cases which can be brought under the provisions of the Evidence Act relating to 'subsequent conduct of the offender or accused.' But at identification parades there can be no

question of subsequent conduct of the offender because the offender is under arrest and is shown to the witness either alone or mixed up with others for being identified.

Strangely enough, however, sometimes it is held that the witness should not have seen the offender between the time of the offence and the time of the identification parade when the fact that the witness saw the offender subsequent to the commission of the offence (namely at the identification parade) is sought to be treated as a relevant fact.

Such evidence cannot be corroboratory under S. 157, Evidence Act. A statement of a witness cannot be corroborated by the statement of another witness under that section.

Identification parades are essential for police investigation in the same way as police statements of witnesses notwithstanding that the latter are inadmissible in evidence. Identification parades are essential to the police for discovering offenders and for building up their case. Identification parades held in the course of police investigation may also be used by defence for purposes of contradiction.

Even if identification parades are held by Magistrates, evidence of such identification would not be admissible unless the Magistrate who held the identification parade was competent to investigate the fact (*vide* S. 157, Evidence Act). Of course the trying Magistrate or Judge may hold an identification parade before the witness is brought to give evidence.

Evidence of any other identification before the police in the course of investigation is subject to the same disqualification. Evidence of identification of property in the course of police investigation amounts to a statement made to the police in the course of investigation that the article or property picked out belongs to the witness and as such inadmissible. Evidence of pointing out a particular place as the scene of offence, or a particular house as the house where any person had been confined, etc., amounts to a statement that the offence was committed at the place pointed out, or that the person was confined in a particular house. Similarly, evidence that a witness identified or picked out one or more foot-prints among several shown to him by the police amounts to a statement that the foot-prints picked out tally with the foot-prints seen by the witness at the scene of offence at or immediately after the commission of the offence. All such evidence is therefore subject to the provisions of S. 162, Criminal P.C., and not admissible on behalf of the prosecution.

7. ('43) 30 A. I. R. 1943 Mad. 602 : 209 I. C. 61 : I.L.R. (1943) Mad. 737: 1943-2 M.L.J. 247 (F.B.), In re Subbarayan.

8. ('43) 30 A.I.R. 1943 Cal. 489 : 208 I. C. 605 : 47 C.W.N. 757 (S.B.), Sushil Kumar Bose v. Emperor.

9. ('43) 30 A.I.R. 1943 Pat. 346 : 209 I. C. 55 : 22 Pat. 565 : 24 P. L. T. 302, Jai Lal Sahu v. Emperor.

BHADWA TALUKA CASE

[NOTE.—In the Court of the Judicial Commissioner, W. I. S. Agency, recently a judgment was delivered by a Special Bench* consisting of Davies J. C., Kaveeshwar and Verma A. J. Cs. The point for decision was whether the attachment of one Indian State to another is ultra vires of the powers of the Crown Representative in view of the provisions of the Government of India Act, 1935. As the decision is of general importance to the legal profession, we are reproducing the judgment of the Special Bench.—*Ed.*]

JUDGMENT

Davies J. C.—This is a criminal revision application by the Bhadwa Taluka, the opposite party being the Crown. The application was made in the following circumstances. The Western India States Agency, which is generally co-extensive with the tract of country known as Kathiawar, consists, amongst other entities, of a large number of States of varying degrees of wealth and importance. By an executive order of H. E. the Crown Representative, acting with the concurrence of the Secretary of State, certain of the smaller States comprised in the Agency were during 1943 attached to other and larger States with headquarters both inside and outside the Agency. Amongst others the Bhadwa Taluka which is a small State was attached to the larger State of Gondal, whose ruler styles himself the Maharaja Thakor Saheb of Gondal.

For this judgment it will suffice to say that the Bhadwa Taluka is a State possessing original criminal jurisdiction, but its powers extend only to the infliction in criminal matters of three months' rigorous imprisonment and a fine of Rs. 200. When offences are committed in the Taluka which are of a more serious nature and appear by law to merit a heavier punishment than is within the powers of the Taluka, the case must be sent for trial to such of the Agency Courts as are suitably empowered in this connexion.

In the present case a certain Bai Jivi was charged in the Bhadwa Taluka with the commission of an offence under s. 309, Penal Code, i. e., it was alleged that she had attempted to commit suicide. Section 309 is punishable with simple imprisonment for a term which may extend to one year or with fine or with both. In accordance therefore with the usual practice the woman was sent for trial to the Agency Magistrate having jurisdiction to determine the case. This officer was the First Class Magistrate and Deputy Political Agent, Western Kathiawar Agency. Before the trial could be completed, Bhadwa Taluka was at-

tached to Gondal State and acting under a notification issued by the Hon'ble the Resident for the States of Western India, the case which was thus still pending was transferred to the Chief Judicial Officer of Gondal State.

On receipt of the information that the case had been so transferred, this revision application was filed by the Taluka in the Court of the Judicial Commissioner, W. I. S. Agency. The application avers that the executive order of attachment issued by the Crown Representative, with the concurrence of the Secretary of State, is illegal and ultra vires of the powers of that high officer under the provisions of the Government of India Act, 1935, the Indian Foreign Jurisdiction Order-in-Council, 1937, and the Letters Patent under the King's Sign Manual of 5th March 1937. The Government of India Act (Chap. 42; 25 and 26, George V) received the Royal Assent on 2nd August 1935. The proviso to s. 2, sub-para. (1) of that Act states that

"any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown."

The effect of this proviso is that where His Majesty does not exercise those functions himself, the Crown Representative or persons acting under his authority are the only persons, who can exercise any of the Royal functions exercisable in Indian States.

During the course of protracted arguments it was freely admitted by both parties that the Bhadwa Taluka was an Indian State within the meaning of s. 311, para. 1, Government of India Act, and it was further admitted that the Taluka was an Indian State in India within the meaning of the same section. It was agreed too that the Chief of the Taluka was a ruler also within the meaning of the same section. Moreover, this Bhadwa Taluka is one of the States dealt with in para. 12 of sch. 1 to the Act. It is the Taluka's averment that by its attachment to Gondal State the terms of the proviso to s. 2 (1) of the Act have been contravened and that therefore H. E. the Crown Representative has exceeded the

* Bhadwa Taluka v. Crown. Criminal Revn. Appln. No. 9 of 1943, Decided on 6th December 1943.

powers granted to him by His Majesty in Parliament in this behalf.

It cannot, I think, be gainsaid that the exercise of what are called these residuary judicial functions by the judicial officers of the W. I. S. Agency, such as are here exemplified by the trial of this subject of Bhadwa Taluka by an Agency Magistrate, is one of the functions of the Crown in its relations with Indian States and is therefore a function properly to be exercised by H. E. the Crown Representative or by persons acting under his authority. Now the proviso clearly sets out that these functions are to be exercised only by the Crown Representative or by persons acting under his authority. It is the contention of the Bhadwa Taluka that these residuary, amongst other, functions, which have now been transferred to the Gondal State, cannot so be transferred under this proviso, for, it is not now nor has it ever been suggested that the Judicial Officers of the Gondal State are under the authority of the Crown Representative. During the course of arguments no support for the contention that officers in Indian States are under the authority of the Crown Representative was adduced and I apprehend that any such suggestion would be strenuously resisted not only by the particular State concerned, but by every State in India.

It was urged that hitherto the integrity and independence of the States had been carefully preserved by the Paramount power, that were it ever to become necessary, owing to misrule or for other reasons, to depose the ruler of an Indian State, the powers of that State would in no way be affected and further that in ordinary circumstances, if, having regard to the best interests of the State subjects, any interference in the internal control of the State became necessary, the effect would be achieved as a result of advice tendered by the higher political authorities.

The necessary concomitant of the word 'authority' would appear to be obedience to the orders of that authority. Statutes have asseverated the suzerainty of the Paramount power over the Indian States but it has hitherto never been asserted that the Paramount power has authority over their Officers. The suggestion seems to me entirely repugnant to the clear phraseology and underlying thought of the Government of India Act. That being the case it is impossible to decide otherwise than that these orders as regards the attachment of Indian States made by H. E. the Crown Representative with the

concurrence of the Secretary of State are a startling reversal of the purpose and policy clearly set out in the Government of India Act. They represent, I think, an entirely new departure from the previous policy and are, therefore, not only according to the strict letter of the law but also in essence, ultra vires of the powers of the Crown Representative, until the necessary further parliamentary sanction has been obtained.

The explanation offered by the learned Crown counsel was that these attachment orders did not purport to be under the provisions of the Government of India Act. He relied on the prerogative of the Sovereign and delineated the attachments as "Acts of State." He further contested the jurisdiction of this Court, alleging that its functions were political only, that it was not a municipal Court and that its jurisdiction had been removed by virtue of a Political Department Notification dated 25th August 1943.

To deal with the question of jurisdiction first, it is not, I think, a difficult one. I understood the arguments advanced as being roughly divided into two parts, firstly, that this Court was of a political nature only and was therefore precluded from dealing with such matters of State, and secondly that even if it were not so, the notification already referred to of 25th August 1943 finally abolished the Court's jurisdiction so far as the attached States therein mentioned were concerned.

That this Court's functions are of a political nature only is clearly I think an erroneous assertion. The Court was duly constituted in 1924 by the notification No. 473-1 dated 3rd October 1924, which notification was varied, though without impairing its substance and effect in April and November, 1933. Jurisdiction was granted to the Court in exercise of the powers conferred by the Indian Foreign Jurisdiction Order-in-Council of 1902 and of all other powers enabling him in that behalf by the predecessor of H. E. the Crown Representative, viz., the Governor-General. Amongst other powers the Court was granted (*vide* (3) in the notification of November 1933) all the powers exercisable by a High Court under any other law for the time being in force in the said places. The Foreign Jurisdiction Order-in-Council was issued by virtue and in exercise of the powers vested in His Majesty by the Foreign Jurisdiction Act of 1890. It is, I think, therefore impossible to argue in this connexion that this Court is not a municipal Court duly constituted, and in view of the fact that the Government of India

Act of 1935 is still in force in India, it is certainly the duty of this Court to adjudicate on alleged breaches of the Act committed in its own jurisdiction.

As regards the second contention that the notification of 25th August 1943 abolished the jurisdiction, a perusal of that notification will show that the abolition of the jurisdiction is expressed to proceed as a result of the attachment in the present case of the Bhadwa Taluka to the Gondal State. If, therefore, as I have held the attachment of the State is illegal and ultra vires, the results flowing from that illegal attachment will themselves also be illegal, viz., the abolition of the jurisdiction of this Court. It seems to me therefore that there is no substance in either of these two contentions.

It is now necessary to consider the further submission of the learned Crown Counsel by which it was attempted to exclude the present attachment orders from the operation of the Statute. Counsel variously asserted that they were Acts of State or were instances of the exercise of the prerogative by the Sovereign. The leading case on this subject is still I think that of the *Attorney General v. De Keyser's Royal Hotel* decided by the House of Lords in 1920 (1920 A. C. 508).¹ So far as this present petition is concerned, it may I think be taken that the Acts of State here pleaded are the result of the exercise of the prerogative. The prerogative has been variously defined but a definition is not here very important in view of the occasions set out in that House-of-Lords case where it is now definitely agreed that the exercise of the prerogative has been waived by the Sovereign.

When legislation receives the Royal Assent, it is now the accepted convention that the Royal Prerogative merges in the provisions of the Statute, and where those provisions are succinct, no further exercise of the Prerogative will be attempted. The Statute has become the touchstone for the future acts of the Sovereign and those acts will invariably conform with the Statute's provisions. Having regard therefore to the wording of the proviso to s. 2 (1), Government of India Act, and the very clear directions and statements of policy therein contained, it is I think useless to argue that these attaching orders ought to be accepted as instances of the exercise of the prerogative as regards the functions of the Crown in its relations with the Indian States. In so far as the persons, who are to

exercise those functions are concerned, the prerogative has been merged in the Statute and if orders are promulgated outside the Statute's provisions those orders are illegal and ultra vires.

I would therefore allow this revision and direct that the rule be made absolute.

Kaveeshwar A. J. C.—This is an application against the order of the Deputy Political Agent, Western Kathiawar Agency, passed on 27th July 1943 requesting this Court to revise the same and set it aside.

The facts out of which the present application arises are as follows :

The accused-respondent 2 was committed by the Bhadwa Police to the Court of the Deputy Political Agent for trial under s. 309, Penal Code, under the residuary jurisdiction of the Agency. On 16th April 1943, His Excellency the Crown Representative issued a notification transferring the residuary jurisdiction of the Bhadwa Taluka from the Agency to the Gondal State. In pursuance thereof the Hon'ble the Resident, Western India States Agency, issued a similar Notification on 4th June 1943 and the Bhadwa Talukdar was informed about the same on 11th June 1943. The Talukdar then applied to the Deputy Political Agent on 21st July 1943 protesting against the said Court's order of transfer, but the application was rejected.

This Court issued notices to the Talukdar and the Public Prosecutor, Kathiawar. The parties were heard at length at Ajmer by a Bench of three Judicial Commissioners. Respondent 2 (the accused) supports the applicant. The Crown objects on the grounds of this Court having no jurisdiction to hear this application and of the transfer of jurisdiction being an Act of State. Three other cognate applications have been heard along with the present application.

The following points arise for determination :

1. Whether this Court has jurisdiction to hear this application and applications in the cognate cases?

2. Whether the communique dated 16th April 1943 and the subsequent Notifications issued by the Crown Representative attaching Bhadwa Taluka and other smaller States concerned to Gondal and other larger States, are ultra vires and illegal? If so, whether the consequential orders transferring pending cases from the Agency Courts to the other bigger States are legal?

3. Granting that the attachment orders are

1. (1920) 1920 A.C. 508 : 89 L.J.Ch. 417 : 122 L.T. 691 : 64 S.J. 513 : 36 T.L.R. 600.

valid, whether the transfer of cases is valid, inasmuch as it has the effect of taking away the jurisdiction of this and the other Agency Courts?

It has been urged on behalf of the Crown that jurisdiction has been given to and taken away from the Agency Courts at the pleasure of the Governor-General in Council, by various notifications issued in the Political Department, and that the said Courts have not been constituted under any Act, Statute or Legislation. The learned counsel for the Crown relies on 33 Cal. 219,² wherein it was held by the Privy Council in 1905 that the whole system of the judicial administration in Kathiawar was political and not judicial in its character, as all the arrangements till then were carried out by orders or resolutions of the Executive Government. This is true. But it appears that after 1924 the jurisdiction of the Agency Courts has been settled under the Foreign Jurisdiction Act of 1890 and under other Orders in Council. There is no dispute that the Orders in Council have statutory effect. But it is argued that the Act and the Orders have not appointed any Court, but merely given the powers to appoint Courts and regulate functions; and consequently the orders issued in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order-in-Council, will be executive orders. Now the state of affairs that flourished in 1905 is no longer in existence. The Courts have now been appointed under the notifications of the Governor-General in Council and the Crown Representative, who were given enabling powers to constitute Courts; and their orders and notifications will have the same force as an appointment under the Act. Thus this Court and all other Agency Courts are equally the Courts of His Majesty.

It was next argued on behalf of the Crown that as the jurisdiction of this Court has been taken away by the notification of 25th August 1943, the Court ceases to have authority over the present case and it has no right to enquire whence its powers came and went. It is further urged that the provisions of the Civil and Criminal Procedure Codes have been applied to the Agency Courts not by legislation, but by orders and notifications. There does not appear, however, to be much substance in this argument. The Criminal Procedure Code and other enactments do not apply to these Courts, as they are not sitting in British India. These enactments have therefore to be adopted. The

learned counsel for the applicant contends that when the jurisdiction of any Court is attempted to be taken away, the said Court will have power to enquire into the question as to whether it has been lawfully taken away. Reliance has been placed in support of this proposition, on the cases of *Damodar Gordhan v. Deoram Kanji* and *Empress v. Burah*, reported in 1 Bom. 367³ and (1878) 3 A.C. 889⁴ at p. 904 respectively. The principles enunciated in these cases show that this Court is empowered to consider whether the notification removing its jurisdiction is valid and lawful. Even the learned counsel for the Crown fairly admits that this Court can examine the competency or otherwise of the authority issuing such orders, though it cannot go into the motive or reasons for doing so. I agree with this view.

The notification of 25th August 1943 issued by the Crown Representative in the exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1937, and all other powers enabling him in that behalf has directed that this Court and all other Agency Courts established or continued by his authority shall cease to exercise any civil or criminal jurisdiction in the States, talukas and estates since they were attached to other bigger States specified in the schedule annexed. This withdrawal of jurisdiction no doubt has been effected ostensibly by the same authority which conferred it. In this respect what has to be considered is whether the jurisdiction conferred on this Court by the Act of 1890 and by the Order in Council of 1902, has been taken away under the Act and the Order in Council. It is true that the notification mentions the Order in Council, 1937, but the orders therein contained appear to be in contravention of the powers given to the Crown Representative. The notifications issued in 1924 and thereafter defining the jurisdiction of the Judicial Commissioner were issued under Rr. 3 and 4 of the Order in Council, 1902. The fresh Order in Council issued in 1937 is to be read subject to the provisions of Parliamentary statutes. All notifications to be issued by the Crown Representative must be within the limits and ambit of his enabling powers. The Order in Council, 1937, was issued as a result of the provisions of the Government of India Act of 1935, which is an omnibus Act. Section 3 (2) of the Act provides that a Crown Representative should be appointed and so the Letters Patent of 5th March 1937, were issued. Clauses 4 and 5, Letters

2. ('06) 33 Cal. 219 : 33 I. A. 1 : 10 C.W.N. 361 : 3 C. L. J. 395 (P. C.), *Hemchand Devchand v. Azam Sakarlal Chhotamlal*.

3. ('75-77) 1 Bom. 367 : 3 I. A. 102 : 3 Sar. 543 (P.C.).

4. (1878) 3 A. C. 889 : 4 Cal. 172 : 5 I. A. 178 : 3 C. L. R. 197 : 3 Sar. 834 (P.C.).

Patent, explain the mode in which the Crown Representative is to act. Clause 2 (i) of the Order in Council, 1937, shows that his office is created by the Letters Patent and under S. 2, Government of India Act of 1935. The Crown Representative is not to exercise functions outside the Letters Patent and the Act. The notification of 25th August 1943, seems to be inconsistent with the preamble and ss. 1, 8, 9, 10, 11, 15 and 16, Foreign Jurisdiction Act of 1890, and therefore cannot be said to be under the Act of 1890 and the Order in Council and will not legally take away the jurisdiction of this and the other Agency Courts, validly constituted under the Foreign Jurisdiction Act of 1890.

For the above reasons, I hold that this Court has jurisdiction to hear the present applications.

On the one hand it has been contended that the communique of 16th April 1943, and the notification of 25th August 1943, are illegal and ultra vires. The other side alleges that they have been issued under the prerogative powers of the Crown and being an Act of State cannot be questioned in any Court. In certain circumstances no one disputes the Crown's prerogative. The communique and the consequential notifications purport to have been issued under the authority of law or enactment. It has been held in several decided cases that if the field of the prerogative is covered by statute, the prerogative ceases to exist: *see* 1920 A. C. 508¹ at p. 526 and (1931) 1 Ch. 169 at p. 185. But only that which has been specifically laid down will be excluded from the exercise of the prerogative. By the Government of India Act of 1935, the prerogative of the Crown was circumscribed. Sub-section (1) of S. 2 includes all the rights formerly enjoyed. Section 2 (2) states this position. These rights were then re-distributed. The proviso to S. 2 (1) makes full provision for the channel through which the powers are to be exercised. Firstly the powers are to be exercised by His Majesty and, if not exercised by His Majesty, only by the Crown Representative or by persons acting under his authority.

The point to be considered in this connexion is whether State officers are persons over whom the Crown Representative has authority. Gondal State Courts and officers or Courts and officers of other bigger States are not under his authority even though the Crown has suzerainty over the Indian States. Section 4, Letters Patent, makes it clear that the authority must be under his direct control or subordinate to him. Section 3 (2), Government of

India Act, 1935, provides that a Crown Representative should be appointed. The Letters Patent of 1937 therefore issued. Clauses 4 and 5 define his authority. In cl. 4 it has been laid down,

"Our Representative may on our behalf employ or appoint all such officers and servants as may seem to him necessary for the due performance of his functions."

This is further made clear by clause 5 which states,

"Our Representative may further regulate the conditions of service of all officers and servants employed or appointed by him, or authorities subordinate to him."

These provisions leave no scope for employing officers of the larger States, or transferring a part of the Crown's responsibilities to intermediate States. The Order-in-Council of 1937 has been issued in pursuance of the Government of India Act, 1935, and refers to the appointment of the Crown Representative, made by the Letters Patent only 13 days before. As such, the Crown Representative has no authority to exercise functions outside the Letters Patent and the Act. It seems to me necessary to read the Foreign Jurisdiction Act, the Orders-in-Council and the Letters Patent together.

The learned counsel for the Crown argues that the Order of 1937 amends the Order of 1902 and the words "may delegate any such power or jurisdiction to any servant of the British India Government etc." found in the latter, have been omitted from the former. It is similarly found that the words, "By cession or conquest" in the Act of 1890, were omitted from the Order-in-Council of 1902. It has to be remembered that in 1902 the Judicial administration was made statutory and so the words "servants etc." were incorporated in the Order of 1902 as necessary to lay down the channels through which to carry out the administration. After that the omnibus Act of 1935 was enacted and consequently there was no necessity to retain the said words in 1937.

We have been referred to some other sections of the Government of India Act, 1935. It is alleged that S. 285 of the Act reserves the Crown's rights. This provision in reality helps the applicant's case. The section means that till Federation comes into force, the rights and obligations of the States are preserved. The Crown cannot divest itself of the obligations and responsibilities. The communique on the other hand declares that the responsibilities and obligations are transferred to the larger States. One of these obligations is to administer justice in a particular way. Sec.

tion 294 (4) declares that the powers and jurisdiction hitherto exercised in Indian States shall continue to be so exercisable and in full force till amended or revoked by a machinery similar to the one creating them. The proviso to the said sub-section of course lays down that His Majesty is in no way prohibited from relinquishing any power or jurisdiction in any Indian State. But the present is not a case of relinquishment or withdrawal. Looking to the policy of the whole Act and reading ss. 5 and 6 thereof, it appears that Government have accepted the sovereignty of these States. They have not been forced to enter the Federation. 20 years' time has been given to them to join if and when they so desire. Their legal status thus seems to have been recognised by a Parliamentary Statute.

The communique in question is contrary to many of the provisions of the Act. If the attaching States enter the Federation, the attached States go automatically with them. Thus the choice left by the Act has been taken away. The communique speaks of establishing a new relationship between smaller and larger States. It substitutes an agency or instrument other than the one provided for in the Government of India Act. Section 2 prescribes the channels through which the various powers may be exercised and to that extent the prerogative can be said to have been restricted. Finally, as the Crown Representative has attempted to override the policy laid down by the Act, the communique and the consequent notifications are bad and hence illegal and ultra vires. This Court is not concerned with the grievances of the smaller States in general nor with the effect of this new policy.

The transfer of the present cases by the Crown Representative will be void, even if the attachment orders are good for certain other purposes not prescribed in the Act, as it has the effect of taking away the jurisdiction of this and the other Agency Courts established under the Foreign Jurisdiction Act and the Order-in-Council 1902, hitherto exercised by persons, who were under the authority of the Crown Representative.

Lastly it is urged that the present case has already been transferred to the Gondal Courts and that this Court will be unable to recover it. I think it is not the concern of this Court to inquire how the authorities of the Crown will carry out its orders. It will be sufficient to observe that the decision will be worked out in the ordinary course of law.

For the above reasons, I agree with the

final order propounded by the learned Judicial Commissioner.

Verma A. J. C. — I have read the judgments of the learned Judicial Commissioner and my learned brother and have given my best consideration to the elaborate arguments of Sir Chimanlal Setalvad and Mr. Coltman; in full agreement with my learned colleagues, I have come to the conclusion that this application should be allowed. I am not able to see eye to eye with Mr. Coltman in his contention that this Court cannot pass any effective orders in this case, or that this Court has now become functus officio. The applicant's grievance is that the order of the Deputy Political Agent transferring this case to the Gondal State and holding that he has no jurisdiction to try the case is illegal. There can be no doubt that if a Court fails to exercise any jurisdiction vested in it by law, that act of the Court amounts to an illegality, which can be rectified by the appellate Court. It, therefore, follows that if the order of the Deputy Political Agent that he has no jurisdiction left to try the case is wrong, this Court has full power to set aside that order and direct that Court to dispose of the case according to law. It may be that this Court cannot directly issue any order to the Gondal State to return the case to the Court of the Deputy Political Agent as the Gondal State is not subordinate to it. In the present case, however, the Crown is also a party and when once it is decided that jurisdiction vests in the Court of the Deputy Political Agent, it will be for the officers of the Crown to see that the order of the Court is carried out according to law. So far as the jurisdiction of this Court is concerned, there can be no doubt that the contention of Mr. Coltman that the Crown Representative has full powers to divest any Court created by him of total or partial jurisdiction, if considered as an abstract proposition of law, is correct. The reason is obvious. This Court was constituted by the Crown Representative under the power delegated to him by the Crown under the Foreign Jurisdiction Order of 1902. Prior to the Foreign and Political Department Notification No. 479-I, dated 3rd October 1924, appeals and revisions against the orders of the Chief Court of Criminal Justice lay to the Governor-in-Council. By the notification dated 3rd October 1924, the Court of the Judicial Commissioner was empowered to hear appeals and revisions against the orders of the Chief Court of Criminal Justice and it was also provided that the Court of the Judicial Commissioner would have the same powers as a High Court has

over a Court of Session, under the Code of Criminal Procedure. Under the Foreign Jurisdiction Act of 1890, Her Majesty the Queen-in-Council had power to assign jurisdiction to British Courts in cases within the Foreign Jurisdiction Act (S. 9 of the Foreign Jurisdiction Act, 1890). Under S. 10, Her Majesty the Queen-in-Council was also empowered to revoke or vary any Order-in-Council made in pursuance of that Act. It is not disputed that these powers of the Crown have been delegated to the Crown Representative. It is therefore clear that the Crown Representative has full power to withdraw jurisdiction from any Court created by him. In the present case the order of the Crown Representative divesting this Court of its jurisdiction in respect of Bhadwa Taluka is based upon the order of attachment of that Taluka to the Gondal State. In other words, the two orders are connected with each other as cause and effect. This is clear from the notification itself which runs as follows:

"Whereas the semi-judicial and non-judicial States, Talukas and estates in the Western India States Agency and the Gujarat States Agency specified in the Schedule annexed hereto, have for certain purposes of control and development, been attached to certain Indian States, as indicated in the said Schedule.

Now, therefore, in exercise of the powers conferred by the Indian Foreign Jurisdiction Order-in-Council, 1937 and all other powers enabling him in that behalf, the Crown Representative is pleased to direct that the Court of the Judicial Commissioner, Western India States Agency and Gujarat States Agency and (2) that all civil and criminal cases arising from any of the said States, Talukas and estates in this behalf."

The word "Whereas" in the opening part of the notification and the subsequent words "Now, therefore" in the subsequent part clearly imply that the order of the Crown Representative divesting this Court of its jurisdiction was directly based on the previous order of attachment. As a matter of fact, if the order of attachment of Bhadwa Taluka with the Gondal State was a good and valid order, the jurisdiction of this Court would have ceased automatically and there would have been no necessity to promulgate the second order of the withdrawal of jurisdiction. It is therefore clear that the second order flows from the first order and the question of jurisdiction cannot be decided independently of the question of the validity or otherwise of the order of attachment. Before I deal with the powers of the Crown Representative to attach smaller 'units' to larger States, I think it better to consider whether the notification of the Crown Representative attaching Bhadwa

Taluka to Gondal State can be called "an Act of State." There can, however, be no doubt that in cases where the powers of the Crown have been embodied in any statute, it is the statute that rules and the prerogative of the Crown is to that extent merged in the statute. The power and authority of the Crown within a foreign country was first made the subject of statute in the Foreign Jurisdiction Act of 1890. Section 1 of this Act gave Her Majesty jurisdiction in a foreign country in the same and as ample a manner as if Her Majesty had acquired jurisdiction by cession or conquest of territory. We find that in the year 1902, an order known as the Indian Foreign Jurisdiction Order was passed. By this order the Governor-General-in-Council was empowered to exercise all the powers of the Crown, but within the limits of the order, and the Governor-General could delegate this power or jurisdiction to any servant of the British Government in such manner and to such an extent as he thought fit. He was further empowered to make such rules and orders as seemed expedient to him for carrying this order into effect. In the year 1935, the Government of India Act was passed. In S. 2 of this Act, all the rights, authority and jurisdiction of His Majesty in relation to all the territories in India were to be exercised by His Majesty and these functions of the Crown in its relations with Indian States, if not exercised by His Majesty, were to be exercised only by or by persons acting under the authority of His Majesty's Representative. The other provisions of the Act relate to the scheme for a Federation in India. It is clear from a perusal of this Act that the choice of accession of the Indian States to the Federation was left to the Indian Princes themselves and this choice was to be exercised within a period of 20 years. In S. 311 "Indian State" includes any territory whether described as a State, an estate, a jagir or otherwise belonging to or under the suzerainty of His Majesty and not being part of British India, and a 'Ruler' in relation to a State means the prince, chief or other person recognised by His Majesty as the ruler of the State. In the year 1937, Letters Patent were issued by His Majesty the King and it was ordered that all the powers exercised by His Majesty in his relation with the Indian States were, if not exercised by His Majesty, to be exercised only by or by persons acting under the authority of His Majesty's Representative and that His Majesty's Representative has such powers and duties in connexion with the exercise of those functions as His Majesty may be pleased to assign to him.

It is abundantly clear from the provisions of the above Act that the ruler was independent in his own State and was subject to one Paramount Power only, namely, the Crown. There was no intermediate power between the Crown and the Indian States. The Crown Representative was only empowered to exercise the powers of the Crown in relation to all the Indian States, either himself or through persons acting under the authority of His Majesty's Representative. There cannot be any doubt that if the notification attaching Bhadwa Taluka to Gondal State is good in law, it will necessarily have the effect of taking away the choice of the ruler of Bhadwa Taluka to accede to the Federation, for as soon as the Gondal State joins the Federation, Bhadwa Taluka will automatically be federated. It is therefore clear that the order of the Crown Representative attaching Bhadwa Taluka to Gondal State is outside the powers given to him under the Statute. This order not only creates an intermediate authority but has also the effect of absorbing Bhadwa Taluka into Gondal State. The entire scheme and the policy of the British Government has been to preserve the independence of the Indian States subject, however, to certain limitations. It was never the policy of the British Government to absorb the smaller States into the larger ones and the present notification of the Crown Representative clearly militates against the scheme laid down in the Government of India Act and the entire policy of the British Government. It is, no

doubt, true that the Crown can depose a ruler but this, it has to be remembered, is done only when amongst other reasons any State is grossly mismanaged or the ruler is guilty of gross misconduct. Moreover, in cases where a ruler is deposed, the Crown Representative carries on the administration of that State through his servants till such time as the ruler improves his conduct or the next person entitled to succeed attains majority or is found fit to rule. The Crown never absorbs the State, and much less merges it into another State. It is therefore clear that the order of the Crown Representative attaching Bhadwa Taluka to Gondal State is illegal. Even if it be supposed for the sake of argument that the attachment is good, the order transferring the jurisdiction of the Court to Gondal is, in any event, bad in law. The Crown Representative being already seized of them can abandon these powers, if he chooses to do so. In such cases the power reverts to the Ruler. If the Crown Representative wishes to delegate this power to any other person, he can do so only to a servant of the Crown who might be said to be acting under the authority of the Crown Representative and not to any other Ruling Prince, for the Ruling Prince cannot be said to be a servant of the Crown, acting under the authority of the Crown Representative.

In view of all these facts I find that the order transferring jurisdiction to Gondal State is bad in law and therefore illegal and ultra vires.

REVIEW

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Hindu Law and Codification.

(A criticism of the proposed bill of intestate succession.).

by B. D. KATHALAY, B.A., LL.B., *Advocate, Nagpur, Member of University Courts, Nagpur and Delhi.*

The Intestate bill.—The bill as amended by the Select Committee contains 23 clauses. Clause 1 is divided into 4 sub-clauses and deals with the short title, extent, application and commencement of the Act. Clause 2 contains the definitions. Clause 3 lays down the application of the Act. Devolution of heritable property of males is given in cl. 4, while right of women over *streedhan* is dealt with in cl. 12. Cl. 13 lays down the order of succession to *streedhan* property. Clause 22 provides for escheat and cl. 23 refers to the repeals.

Preamble of the bill.—The preamble of a statute has been held to be a key to the proper understanding of the meaning and object of the Act: 62 Cal. 125.¹ The preamble of the present bill is as follows:

“Whereas it is expedient to amend and codify, in successive stages, the whole of Hindu law now in force in British India; and whereas it is expedient to amend and codify the general law of intestate succession; it is hereby enacted as follows.”

Amending the law of intestate succession.—From the history of the present bill it would be seen that no one wanted that the whole law of intestate succession should be amended. The object of the appointment of the committee was only to deal with the problems arising out of the interpretation of the Hindu Women's Rights to Property Acts, and much less was it ever intended that the principles of Mahomedan law or Indian Succession Act should be grafted on the sacred law of the Hindus.

Adaptability of Hindu law.—Hindu Dharmashastra or Hindu law, in its ordinary sense includes religious as well as legal injunctions. The Dharmashastras have culminated into divergent schools on account of the fact that Hindu theology, law and metaphysics are commingled with one another, and the tendencies or the methods of reasoning and interpretation which influence one branch of knowledge also influence others. For example, in Eastern part of India, namely, Bengal and Bihar, where Vedas are less read and Mimansa less

studied than in the South, the dialectic philosophy or Nyaya is consulted more and is relied on for rules of reasoning and interpretation upon questions of law as well as metaphysics. This has given rise to two principal schools of law which, owing to their divergent methods arrive at different conclusions from the self-same text of law: 14 ALL. 67² at p. 80. Such divergence is inevitable because the Hindu nation consists of peoples having diverse tongues, colours, and modes of life. The Hindu law aims at creating unity in diversity by allowing each group of the people to mould the law according to its requirements. On account of this large-minded and accommodative policy of Hindu jurists the Hindu law has developed from time to time and from place to place. This is why the Hindu law could change according to circumstances and surroundings from the times of the venerable Manu till the introduction of the British system of administration of justice. This remarkable progressive tendency of Hindu law was retarded during the British period of Indian history.³ The Hindus also carried their law to Burma, Java, Sumatra and other places and where it still governs the bulk of the populations of those countries. No doubt the Hindu law has worn the local garb but it has kept its individuality intact, so much so that the law of *Damdapat* is still prevalent in Sumatra. Owing to this peculiar capacity of Hindu mind and Hindu law, the Hindu nation has become assimilative and progressive.

Advisability or otherwise of abolishing different schools of law.—According to the bill under review the Bengalis and the Punjabis would be governed by one Code of Hindu law. How far this contemplated measure

2. ('92) 14 All. 67 : 1892 A.W.N. 161 (F.B.), *Beniprasad v. Hardai Bibi*.

3. Banerjee in his *Law of Marriage and Streedhan* says: The Hindu law was highly elastic, and has been gradually growing up by assimilation of new usages and the modification of ancient text law under the guise of interpretation, when its spontaneous growth was suddenly arrested by the administration of the country passing into the hands of the English, and a degree of rigidity was given to it which it never possessed before.

Sir Henry Maine says: Under the hand of the Judges of the Sudder Courts, the native rules hardened, and contracted a rigidity which they never had in real practice. (*Village Communities*).

1. Maxwell on Interpretation of Statutes, Edn. 7, pp. 37, 38, ('34) 21 A.I.R. 1934 Cal. 741 : 153 I.C. 291 : 62 Cal. 125 : 60 C. L. J. 298 : 38 C. W. N. 1056, *Badar Rahim v. Badshah Mea*.

would satisfy the needs of divergent people is not stated anywhere. In a case of Aroras in the neighbouring districts of Muzaffargarh it was held that by custom the daughters of a sonless proprietor were excluded by collaterals from succeeding to the ancestral property. It was said that this custom was dictated by local circumstances, as the district being rugged and wild, it was difficult for females to retain and manage the immovable property: 17 Lah. 61.⁴ Solon, the Greek legislator, said two thousand years ago that the laws which were proposed by him might not be the best, but they would be such as the people would be most disposed to accept. Will the abolition of the different schools of Hindu law by an Act of Legislature contribute to the natural growth of Hindu law? The answer is in the negative. The Code will lend rigidity to the whole law and it will not develop unless the Legislature takes into its mind to revise the law so as to keep pace with growth of the times and the needs of the people. It is common knowledge that the Legislature, moves very slowly. This fact can be gathered from the time it has taken to amend the Contract Act and its inactivity in not amending the various Codes which deserve immediate amendments, and on account of this the law Courts are forced to administer the law which has outlived its utility. This point would be discussed in detail in the sequel.

The question of codification of the whole of Hindu law was not before the public for consideration.—The various Civil Courts Acts enacted in India comprise only a few select topics of the Hindu law, such as succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, family relations, wills, legacies, gifts, partitions or religious usages or institutions. When the questions issued by the committee were before the public for expression of opinion the above topics were not included and, therefore, they were not naturally considered by the public. They had no idea that the whole of Hindu law was so bad that it requires amendment in every branch. Why the Hindu law has become so distasteful within the last few years has not been made clear anywhere. Moreover, the committee did not care to lay down the principles according to which the various branches of Hindu law are to be amended. Even conceding for a moment that Hindu law requires radical change it is difficult to believe how it could not have shared

the same fate in the year 1939, when the Central Legislature, the very Legislature, which is out for codifying Hindu law had felt justified in incorporating the much maligned principle of indissolubility of Hindu marriage in S. 2 of Muslim Marriage Act (8 of 1939). Similarly it was with open eyes that the various Provincial Legislatures allowed recently the rule of Damdupat, propounded by the venerable Manu, to have a place in their statute books.

Whether Hindu law-givers codified Hindu law and whether codification of Hindu law possible.—The view that in the old days "the task of codifying the law from time to time was performed for us by successive law-givers and commentators,"⁵ is not correct. When a law is codified the previous law is repealed. No one can say that Manu's law was ever repealed and it was substituted by another Smriti. The sage Yajñawalkya has cited about nineteen Smriti writers but nowhere has he said that the old smritis cited by him were no longer a law, and, therefore, they should not be followed. Nowhere is it laid down that even a particular portion of any of the Smritis or their commentaries has lost its force and is not binding on the Hindus. In speaking about Hindu law a mistake always occurs that it is supposed to be a command of a sovereign or a political superior. Hindu law was never promulgated by any power, political or otherwise. Apart from the fact that the Hindus believed in the divine origin of their law, it was obeyed not because of any physical sanction behind it but because it was based on natural justice and common-sense and its potency to maintain the solidarity of Hindu society. By codification the very basic principles will lose their moorings. Codification will mean a command of a political sovereign; and it will come under the definition of law as propounded by Austin, which is denied in his own country. When the Hindu law will be transformed into a command of a political superior, it cannot be changed without his permission and this will retard the free growth of the law itself, a thing which will not be appreciated by any reasonable man. And if Hindus submit to it by their own free will, they will invite their own disaster. It appears that this point of view was not considered by the learned authors of the bill.

It is also not true to say that commentators codified the law. At best they have only interpreted it. For example, that great judicial intellect the Yogi Vijnaneshwar did not repeal

4. ('35) 22 A.I.R. 1935 Lah. 518 : 165 I.C. 754 : 17 Lah. 61 : 38 P.L.R. 395, Ganga Ram v. Naranjan-das.

5. Hindu Law Committee Report, Para. 15, p. 11.

the holy Institutes of any of the predecessors of the sage Yajñawalkya. The same is true of Dayabhaga or Vyavahara Mayookha. No doubt, these works kept the law abreast of current needs and current sentiments but not by codification. Their authority was followed because of the great judicial intellect of those writers on law and not because of any physical sanction behind them. They had no power to punish those who refused to follow them. If one refuses to obey the law, right or wrong, given by the Legislature to-day, he will have to submit himself to the long arm of the law. How this long arm works is common knowledge and need not be dwelt upon. It may also be noticed that these works are complementary to each other. Though the Mitakshara is the supreme authority in the whole of India except Assam and Bengal, yet even in Bengal the Mitakshara is still regarded as a very high authority on all questions in respect of which Dayabhaga is silent. The law reports teem with judgments where the questions in one school are decided according to the dictates of the works of authority prevalent in other schools. Similarly Dattak Chandrika and Dattak Mimansa are equally respected throughout the whole of India irrespective of any difference of opinion on other vital points. It may be added that a case of partition governed by the Mitakshara school was decided according to the views of the Vyavahara Mayookh by the Lords of the Privy Council. All this goes to show that the view that Hindus codified their law from time to time is not correct.

The committee while recommending the codification of all the elements of Hindu law seems not to have taken into consideration the views expressed by two Royal Commissions and the Civil Justice Committee. Under the Charter Act of 1833, a law commission was appointed to codify both the Hindu and the Mahomedan laws. But as it appears from their report dated 13th December 1855, the law commissioners abandoned the attempt on the ground that it would arrest the development of Hindu law and they held that the Legislature possessed no power to do it. This commission was followed by several other commissions, namely, the second commission appointed in the year 1853 by S. 28, Charter Act (16 and 17 Vic., Ch. 95) 1853, the third commission appointed in the year 1861 by the Secretary of State, fourth commission appointed by the Viceroy with previous sanction of the Secretary of State in the year 1921. All these commissions were unanimous in their opinion. The Civil Justice Committee

which sat later observed that the attempt to codify Hindu law is likely to be successful in some branches and almost abortive in others. Hindu law is, according to them, highly complicated and yet logical. The recommendation that Hindu law should be codified is therefore entirely misconceived.⁶ Similarly when Sir Hari Singh Gour moved a resolution to codify Hindu law, the Government of India itself declined to do so.

A sketch of the whole of the codified Hindu law ought to have been placed before the public so as to give idea about the law as a whole: — Just as before putting up a large building the architect surveys and sounds the site on which he has to build and after taking into consideration all these factors submits the sketch of the whole building for approval, similarly the law committee ought to have given the public the whole picture of their intention so that the persons concerned would get a comprehensive view of the subject. Another advantage of this method would be that one would be able to examine its repercussions on other branches of law. For example, the bill provides for the succession of simultaneous heirs peculiar to Mahomedan law. But the bill does not say anything about the pious obligation of the son to pay his father's debts. Is the son liable to pay the whole of his father's debt though he may inherit only a part of the inheritance? Or are all the heirs liable to pay the debt? If so, in what proportions? Without these details one would find it difficult to judge the soundness of the provisions of the bill. Moreover, according to Mahomedan law the estate of the deceased is to be applied successively in payment of the funeral expenses, death-bed charges, expenses of obtaining probate, letters of administration or succession certificate, wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant; other debts of the deceased according to their respective priorities (if any) and legacies not exceeding one third of what remains after all the above payments have been made. Are these rules applicable to the estate governed by the bill? Similarly, it is also necessary to note the effect of alienation by an heir of his share before the payment of the debts of the deceased. Such points and the like require explanation.

Codification in successive stages. — The Report says that the plan for a comprehen-

6. Report of the Civil Justice Committee, Chap. 47, pages 534, 535.

sive code may have the effect of delaying reform; but even delayed reform is better than piecemeal legislation which has to be amended and recast every now and then. The need is for a comprehensive, co-ordinated solution rather than quick remedies.⁷ But the committee followed a different procedure. Instead of giving a comprehensive code the committee wants to make the code by instalments. This method is open to question.

Disadvantages of the codification of Hindu law. — One of the palpable dangers of a complete code is that it fixes up the mobile elements of the law at its very inception. It may petrify them and deprive them of their capacity of growth under the care of scientific doctrine at the call of the extended needs. The danger reaches its climax when the principles of a foreign system are imposed on a community of different character and habits; and the greatest danger lies in fixing up the terminology.⁸ It may also be remembered that the value of codification is no longer esteemed as highly as when Sir John Salmond wrote. Codes like all express enactments require interpretations and the latter require codification because of the diversity of judicial opinions and thus a vicious circle is formed. The continental countries having codified laws have increasingly taken to reported cases, though treating them differently from the English method, and the most distinguished jurists of France appeal to *jurisprudence constant* as frequently as English lawyers do to precedents.⁹ Therefore in recent years the estimate of the superior value of legislation in the sense of direct legislation of new principles has declined. All nations with codes have found interpretation necessary and therefore the general principles are enacted in a "skeleton" form leaving the details to be settled by administrative decisions, which is not law in the strict sense of the term.¹⁰ Therefore recently Turkey gave up the idea of codifying the Mahomedan law, which was subsequently replaced by the Swiss Code along with its commentary.

Disadvantages of codification illustrated by Indian Evidence Act, Indian Contract Act, Civil Code of California and the Code of Procedure in Newyork. — That a good code is a good thing, but a bad code is, in a country which possesses competent judges, worse than no code; these are the proposi-

tions which need no explanation. The imperfect success of the Evidence and the Contract Acts in India is but another instance in addition to those furnished by the Civil Code of California and the Code of Procedure in Newyork of the difficulties which attend these undertakings. Long before the codification of the various branches of law was talked of in India, Savigny had shown how hard it was to express the law in a set of definite propositions without reducing the elasticity and impeding its further development.¹¹ The Indian experience of codification did not impress the English mind about the utility of a codified system of law with the result that the jurists in England hesitate to codify their own laws.

Codification and the divergence of Judicial opinion on the interpretation of the various Acts amending the Hindu law.

— Whatever may be the advantages of codification, one disadvantage is certain viz., that it gives rise to the divergence of judicial opinion on the meaning of the words used in the Code. This can be understood from the sharp difference of opinion among the various High Courts regarding the meaning or the object of the various Acts which amended the provisions of Hindu law. For example, there is a conflict of judicial opinion on the question, whether the widows, who are by custom of their caste entitled to remarry, lose their interest in the property of their husbands by a second marriage. The Allahabad High Court and the Chief Court of Oudh hold that the provisions of S. 2 of the Widow Remarriage Act are inapplicable in the case of a widow who is permitted by the custom of her caste to remarry and such a widow does not by remarriage forfeit the property inherited by her from her deceased husband. The other High Courts hold a different view. Similarly the simple expression sister is understood or misunderstood in different ways by the different High Courts. The Allahabad, Patna and Madras High Courts hold that the word sister does not include half-sister and therefore she is not entitled to succeed but the Nagpur High Court after considering all these views came to the conclusion that sister includes half-sister and is therefore entitled to succeed. The divergence of judicial opinion will again create new schools of Hindu Code and the Legislature will again be called upon to propose a law by which these sharp conflicts of opinions would come to an end. Thus the Legislature will have to devote considerable time and energy to keep the law uniform throughout the

7. Hindu law Committee Report, para. 17, pp. 12, 13.

8. Report of the Indian Law Commission (1879) para. 42, p. 21.

9. Salmond's Jurisprudence (1937) Edn. 9, p. 59, Note 40.

10. Ibid., 212, 213, Note 142.

11. Bryce's Studies in History and Jurisprudence, Vol. 1, pp. 112, 113.

country. It seems that this view was not considered while the bill was drafted.

Necessity of frequent revision of Codes.

— After an exhaustive enquiry the Civil Justice Committee observed that it is necessary that codes should be revised at frequent intervals. The reason being that

“Our modern world

Has grown so fast out of her old beliefs,
She's like a boy that splits one pair of trousers
Before the next is ready.”

The constant revision of legal codes must throw a quantity of work upon the Legislature which may leave insufficient time for other more important matters. The difficulties of systematic revision become greater as the statute books get larger and new problems press for attention. It may be necessary to remind that the revision of the Transfer of Property Act is one of the urgent needs but no effort in that direction is made upto this time.¹² Similarly the working of the other existing Indian Codes is very defective but no attempt to remedy the defects is made either by the Government or by the public in that direction.¹³ Similar will be the fate of the Hindu Code, which will not grow like other Indian Codes. If the Hindu law is not codified there is a possibility that it will grow if the circumstances become favourable.

Statutory law doing injustice to Hindu community not modified by the committee.

— The statutes which modified the Hindu law from time to time did not receive the attention of the Committee. For example, the Freedom of Religion Act (21 of 1850) repealed the provisions of rules of forfeiture and exclusion from inheritance on change of religion or loss of caste. This Act has excluded the Hindu relations from inheritance and protected the rights of a convert to another religion. In a case where a married Hindu became a convert to Mahomedanism and married a Mahomedan wife and had children by her, the persons entitled to his estate were his Mahomedan wife and children, and not his Hindu wife. 6 Rang. 243.¹⁴ But in this case the Mahomedan husband would be entitled to succeed to the streedhan of his Hindu wife. The law of reciprocity does not apply in this case. This is a specific example where the rights of Hindu women in their husband's property are

denied by the present bill. If the object of the legislation was really to confer better rights on Hindu women, the Legislature ought to amend the provisions of the Freedom of Religion Act (21 of 1850). Similarly this Act requires amendment from men's point of view also.

Similarly nothing is done to remove the disability of a married female, who is debarred from succession under cl. (c) of S. 20, Colonization of the Government Lands (Punjab) Act (5 of 1912). In the same way women are excluded under inam rules from succession. A review of the various provincial Acts and other rules relating to the devolution of property governed by special usages recognised by the statute would give an idea of the exclusion of females from inheritance. Nothing has been done to remove these disabilities though the women excluded under the above Acts and rules are as good as the women excluded by the Hindu law.

Clause 1 (2). Extent of the Code: — The Hindu law not being a command of the sovereign power is not bound by geographical limits. This meant that wherever a Hindu goes he carries his law with him and he is governed by his personal law and not by the law of the place. But this unlimited jurisdiction of the Hindu law is curtailed by the proposed code and no reasons for the reduction of the jurisdiction are given. The result of the passing of the code would be that the property of a Hindu would be governed not by his personal law but by the law of the place where it is situated. For example, the property in French India would be governed by French law, in Mysore by Mysore law and so on.

Personal Law of Hindus versus the doctrines of lex loci and domicile. — There is a marked distinction between the Hindu law and other non-Hindu laws. The Hindu law being a personal law and part of the status of Hindu family it follows a Hindu wherever he goes. For example, a family, migrating from Guzrat, where the Vyawahara Mayookha prevails, to Madras where the Mitakshara is supreme, will be presumed to be continued to be bound by the Vyawahara Mayookha. Similarly a Marwari Hindu from Rajputana would be governed by his personal law, whether it be Mitakshara or custom, and a Sikh from the Punjab would similarly follow the ancestral custom of his home. But this is not the case with the persons who follow the Christian law, which is lex loci or territorial law. Therefore a Frenchman or a Portuguese migrating from

12. Report of the Civil Justice Committee, Chap. 47, Paragraphs 5 and 6.

13. *Ibid* . . . see also Bryce's Studies in History and Jurisprudence Vol. 1, pp. 108-111 for working of Indian Codes.

14. (28) 15 A.I.R. 1928 Rang. 179 : 111 I.C. 2 : 6 Rang. 243, Chedambaram v. Ma Nyein Me.

French or Portuguese India to British India renders himself subject to the Indian Succession Act, the *lex loci*, the reason being that severance from the domicile of origin and permanent residence in different territory would effect the change of domicile and with it the change of law: 43 Bom. 647¹⁵ at p. 677. But this is not the case with Hindu law or the Mahomedan law: 43 Bom. 647.¹⁵ In the case of a Hindu widow residing in French India and subject to Hindu law prevalent there, it was held that she carried her law with her to British India and her rights were to be determined not by Hindu law in British India but by the law of the place from which she came, 24 Mad. 650,¹⁶ and so took absolute interest in her husband's property: 43 Bom. 647.¹⁵ The tenacity of personal law and custom even under the strain of migration has been repeatedly recognised by the Courts and accordingly it is held that the question is one of personal status as distinguished from status arising from geographical situation: 29 Cal. 433¹⁷ at p. 452. If it is alleged that a particular Hindu or a Mahomedan has become subject to the new local custom, the new local custom must be affirmatively proved to have been adopted: 43 I. A. 35.¹⁸

If Hindu law would have been promulgated by a command of a political superior it would have been *lex loci* as are the laws of the Indian Legislature. The Hindu law is a part of religious law of the Hindus and it is inextricably blended with their religious rites and worship and therefore the policy of the Government is not to interfere with their law or religion and this policy is made clear from time to time. (Government of India Act (5 & 6 Geo. V., Ch. 61) 1915, S. 112). It is in keeping with this view that the Hindus are entitled to be judged by their own law wherever they be living.

As the Hindus are found scattered all over India and if their laws were to be altered by each movement, or in accordance with the rule of *rei situ*, they might be subjected to a variety of rules as divergent as the opinions expressed on the bill. It may also be remembered that the

doctrines of *lex domicilli* or *lex loci* apply to countries which possess more or less uniform territorial laws. In the vast continent of India the devolution of property is regulated by many rules and laws, as for example, the Hindu law, the Mahomedan law, the Indian Succession Act, the various Tenancy laws and so many other Inheritance Acts and customs. This list is not exhaustive but it illustrates the absence of any territorial or uniform law in the country governing all the peoples of India. If the bill were to be in the form of a territorial law for all inhabitants of the country then the doctrine of *lex domicilli* would have been useful.

Moreover this rule will give rise to many other important topics, which will require judicial decision from time to time. It will be necessary to fix some domicile to every man or otherwise it may be impossible to decide by what law his rights or those of other persons are to be determined. The cases of actual homelessness must be met by some conventional rule, or, in other words, a person must have a domicile or legal home assigned to him even though he does not possess a real one.¹⁹

The question of validity of marriage and the consequences following from it may open a new chapter in the International law. As for example, whether a customary marriage recognised by the Code will confer legitimacy on children or whether customary marriage is a marriage at all or not would be required to be decided by foreign Courts if the question crops up in a foreign country regarding a Hindu domiciled in British India. Possibly indissolubility of Hindu marriage may be considered as repugnant to the civilised ideas of the West and possibly a Hindu may not succeed if he pleads the same as in America an Englishman cannot confine his wife in an iron cage, or beat her with a rod of the thickness of the judge's thumb though these powers are conferred on the husband by the English law.²⁰

Thus the Hindu law will become more complicated and the questions like the rights of the husband, rights of wife, legitimacy, succession to immovable property situated outside British India will require judicial determination, which as usual will require lot of money and time. When these problems will face the Hindus, they will say:

"... rather bear those ills we have than fly to others we know not of."

Clause (3) and Application of the Act.— Clause (3) lays down that this Act regulates

19. Dicey's Conflict of Laws, 4th Edn. page 83.

20. Story's Conflict of Laws, page 186, para. 111.

15. ('18) 5 A.I.R. 1918 Bom. 39 : 51 I. C. 513 : 43 Bom. 647 : 21 Bom. L. R. 85, Mohamed Haji v. Khatubai.

16. ('01) 24 Mad. 650 : 11 M. L. J. 309, Mailathi Anni v. Subbaraya Mudaliar.

17. ('02) 29 Cal. 433 : 29 I. A. 82 : 8 Sar. 205 : 6 C. W. N. 490 (P. C.), Parbati Kumari Debi v. Jagadish.

18. ('15) 2 A. I. R. 1915 P. C. 86: 32 I. C. 413: 43 I. A. 35 (P. C.), Abdurahim Haji v. Halimabai. This case is not reported in I. L. R. series as it was a case from East Africa. The parties were Mahomedans (Memons) emigrants from India.

the succession to the heritable property of a person to whom this Act applies other than one governed by the Marumakkattayam, Aliyasantana or Nambudri law of inheritance.

The object of the Hindu Code is to give one uniform and common law to the whole Hindu nation. But one does not understand why the code is not made applicable to persons governed by Marumakkattayam and other laws. The Mahomedan members of the Central Legislature seem to be wise when they made Shariat Application Act applicable to all the Mahomedans whether governed by custom or Hindu law. Even the Mahomedan women who enjoyed full rights under the Marumakkattayam and other laws were forced to accept the yoke of Mahomedan law which curtailed the above rights. If the Mahomedans are thus able to increase the number of the followers of the Mahomedan law by an act of Legislature, one wonders why the Hindus sit silent and look to the process with indifference. If one takes into consideration the groups of persons to whom the Mahomedan law was made applicable by an Act of Legislature one is amazed at the inactivity of the Hindu members of the Legislature.

A learned Muslim member of the Central Legislature said that the Muslim Personal (Shariat) Application Act (26 of 1937) is primarily intended to improve the status of women and to confer upon them benefits which are lawfully their due under the Mahomedan law.^{20a} The position of a Mopla lady governed by Marumakkattayam law is infinitely stronger than the position that was sought to be brought about by the Act. From this point of view though Act 26 of 1937 was doing injustice to women yet it was made applicable.

Similarly in the year 1920 an Act was passed whereby Cutchi Memons could declare against the application of Hindu law in matters of inheritance and succession and declare that he along with his descendants were to be governed by Mahomedan law.^{20b} When this Act was on the anvil the Select Committee found that there were considerable number of Cutchi Memons who did not support the bill. And with a view to do justice to minority the bill took the form of an

enabling legislation. But in the year 1938 the Cutchi Memons Act (10 of 1938) was passed with a view to apply compulsion to the minority, which constitutes 30 or 40 per cent. of the population and which might not be willing to bring itself under the Mahomedan law.^{20b} The Hindu Law Committee did not investigate this suffering of large followers of Hindu law and did not try to bring them under the jurisdiction of Hindu law for which they would have felt very grateful. The Cutchi Memons Act ought to be repealed.

Aliyasantana Law not changed by the committee though Jains in Madras Presidency gave up that law and are governed by the Mitakshara.—The Jains in the South Kanara were once the rulers of that country. Now, the Jains are regarded as members of a rich community. They were governed by Aliyasantana law but they found that they suffered many disabilities under it. Therefore they agitated and in the year 1918 they sent a memorial to the Government of Madras requesting that a legislation should be passed according to which they would be governed by the ordinary Hindu law. At last the Jain Succession Act (Madras 3 of 1929) was passed and now the Jains are governed by the Mitakshara law.

It is a matter of surprise to all that the learned men in the Madras Presidency found Mitakshara to be a good law upto the year 1929.

Khojas not following Koran but Dasavatar, a work describing nine incarnations of Vishnu and tenth incarnation of most Holy Ali—whether governed by Hindu Code.—Though Khojas are classed as Mahomedans, they ordinarily know little about the Prophet and of the Koran. They believe in a book called Dasavatar. This book is divided in ten chapters containing (as, indeed, its name imports) the account of ten Avatars or incarnations each dealt with in a separate chapter. The first nine chapters treat the nine incarnations of the Hindu God Vishnu, and the tenth chapter treats with the incarnation of the most Holy Ali, one of the ancestors of Aga Khan (12 Bom. H. C. R. 323²¹ at pp. 358, 359.) These people were governed by Vyawahara Mayookha (29 Bom. 85²² at p. 89.) But after the passing of Muslim Personal (Shariat) Application Act (26 of 1937) an attempt is made to subject them to Mahomedan law, a law originating from

20a. Legislative Assembly Debates, (1937) p. 1427.—Sir Muhammad Yamin Khan :—The Bill seeks to do away with the injustice done to women for a long time by people who do not want to part with their property. This will really do justice to the people who have been suffering for a long time.

20b. Legislative Assembly Debates, (1937) pp. 1834, 1835.

21. ('66) 12 Bom. H. C. R. 323, Advocate-General v. Muhammad.

22. ('04) 29 Bom. 85 : 6 Bom. L. R. 874, Rashid Karamali v. Sherbanoo.

the Mahomedan religion, which they do not follow. It is necessary to make the position of such people clear by bringing them under the jurisdiction of the Code. But can it be done in these days?

Gonds.—The Gonds in Central Provinces belong to an humble tribe living in the districts of Chhindwara and Mandla, where in the ancient times they had established large kingdoms. Rani Durgawati was a sovereign of Garha-Mandla State and she is a monument of Gond heroism and valour. If a question were to be asked what was the law by which succession to the property of this well-known Rani was governed, it would have shown the ignorance of the querist and not of the person who would have answered it and answered it correctly. The question whether the Gonds are governed by Hindu law or not is discussed in many cases in which it has been held that a Gond is not a Hindu and he is not governed by Hindu law. The erroneous nature of these decisions was sought to be rectified by the introduction of a bill in the Central Provinces Legislative Council but it was lapsed.

The bill has not made any clear statement regarding these humble but war-like people.

No lead on the problems facing Hindus on account of their impact with foreign systems and the law to be followed:—The object of codification is supposed to give in unambiguous words the existing rights and liabilities of the persons governed by a particular system of law. Unfortunately the Committee did not give any such lead in cases, arising out of the new situations created by the contact of the foreign systems.

For example, the bill does not include the illegitimate children of a Hindu father by a Christian mother, or the illegitimate children of a Hindu father by a Mahomedan mother to be Hindu though it has been held that the illegitimate children of a Hindu mother by a European father are to be treated as Hindus (8 M.I.A. 400²³). The bill ought to have included the above persons in the class of Hindus.

Similarly the bill has not settled the question, whether the Hindu rule of survivorships is applicable to families of native Christians who continue to be joint even after conversion. According to the Madras High Court it is not applicable to such families but according to Bombay High Court, it is. Thus where two Hindu brothers, A and B constituting a

joint Hindu family, become converts to Christianity and continue to be joint after their conversion and B dies leaving a widow, according to Madras High Court, B's one-half share in the property should go to his heirs under the Indian Succession Act, 1925. According to Bombay High Court, B's one-half share should go to A by survivorship.

The bill ought to have made clear whether the proposed Hindu Code would govern the cases of this type.

Comprehensive Laws of Smritis applicable to those who have no laws of their own:—The Smritis recognise the laws of particular class of people, and permit every community to be governed by its own recognised usages and customs. When the Mahomedans came to India they brought with them their own personal laws and choose to be governed by these laws. The same would apply to other communities inhabiting India or coming from outside who choose to be governed by their own laws. But those who have not expressly so chosen to be governed by particular rules of their own in the shape of usages and customs, will be governed by comprehensive laws of the Shrutis and Smritis which apply to all people (3 Pat. 152²⁴ at p. 169). This nature of Hindu law has not been retained in the present intestate bill. Now-a-days there is a general tendency to hold that Indian Succession Act, enacted for a handful members of a particular Community is lex loci of India, while Hindu law, which governs about 1/5 of human race is not the lex loci of India. The learned framers of the bill did not shed any light on this question. It is necessary to enact that Hindu law is the lex loci of India being a law of the largest number of people.

Clause (I) (3) (I) & (II)—Non-applicability of the Code to estates governed by customs, special Acts and Rules of primogeniture and agricultural property leading to the establishment of different kinds of rules of succession; a circumstance against the object of codification—The object of codification of Hindu law is to give one common and uniform law for all the Hindus in India. But the authors of the bill forget to note that this object of having a common law would be defeated the moment Hindu law is codified in British India. At present there is no difference between the Hindu law administered in the Native States, who are about 300 in number and Hindu law administered in

23. (1861) 8 M. I. A. 400: 2 W.R. 452: 1 Suther 452: 1 Sar. 797 (P. C.), Myna Boyee v. Ootaram.

24. ('24) 11 A. I. R. 1924 Pat. 420: 78 I. C. 749: 3 Pat. 152: 5 P. L. T. 203, Ram Pergash Singh v. Mt. Dahan Bibi.

Dated 24.11.80

British India. Hindu law is now a common law of the whole of India irrespective of its political division. If the law is codified, there would be at least two kinds of Hindu law diametrically opposite to each other—the Hindu Code in British India which is neither Hindu in name nor in substance and the textual Hindu law in Native States. If it is the ambition to have uniform Code throughout India irrespective of political divisions, it will be necessary to enact about 300 more Hindu codes.

Similarly the authors of the bill regard custom more sacred than the divine Hindu law. They are not prepared to touch the customary law at all, though Sir Tej Bahadur Sapru suggested the codification of customary law long ago.

In England the rule of primogeniture has been overthrown by the Administration of Estates Act, 1925. The bill has not embodied the provision of this Act as far as the rule of primogeniture is concerned. Possibly the authors of the bill desire that the eldest son in India requires more protection than in England.

Moreover, this Code will not govern the devolution of agricultural property. This means, if a Hindu dies leaving behind him both agricultural and non-agricultural property, the agricultural property would be governed by Hindu law and the non-agricultural property by the Code. This state of affairs is not healthy. It would encourage litigation. It will also be necessary to define what is an agricultural property.²⁵

Another result as formulated in the report of the Committee would be that in the United Provinces there will be at least three sets of rules of succession and the position will be similar in the Central Provinces and possibly elsewhere.

In face of these conditions one is at a loss to understand the reason of insisting on the codification of Hindu law, a law which is logical and which has influenced all those who came in its contact. For example, among the high caste Mahomedans the divorce is absent. Similarly, the Central Legislature grafted the Hindu principle of indissolubility of marriage in s. 2, Dissolution of Muslim Marriage Act (8 of 1939) according to which the renunciation of Islam by a married Muslim woman on her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage.

The object of the present bill and the proposed Hindu Code is to bring the Hindu law

in accordance with the changing times and evolve out an Act which would satisfy the needs of progressive society. The bill seems not to have attained this standard. Now-a-days there is a tendency among the Hindus — a tendency encouraged by the progressive Hindus—to allow many non-Hindus to embrace Hinduism. The bill does not provide for the problems arising in such cases. For example, an American lady after converting herself to Hinduism married one Ratansi according to vedic rites. He was governed by Mayookh school of law. She died leaving behind her a son who inherited the property belonging to her. After her death Ratansi died in 1934 and his property devolved upon his son of the above marriage. The son died in 1935 leaving behind him a son of the sister of his mother, who was a Christian by religion and a son of the sister of his father who was a Hindu. According to the view of the Bombay High Court, mother's sister's son and father's sister's son succeed in equal shares. In this case according to the bill, can mother's sister's son who is related by legitimate kinship succeed? If so, why; if not, why not? The bill provides no answer for such questions. No one should say that these are exceptional cases. There are many of this type and it is necessary to get some answer for the question raised.

Similarly, according to the Bombay school a married man having a son can be validly adopted. The adoptions according to the bill will sever the tie of the adopted son with the natural family. But will it sever the legitimate kinship of his son before the adoption. The son born before the adoption would be related by legitimate kinship.

Clause 2 (a)—Agnate.—The definition of the word agnate does not give any limit and an agnate is to succeed before a cognate; therefore, a distant agnate would exclude a nearer cognate.

Clause 2 (c) — "Related." — Clause 2 (c) lays down: "Related" means related by legitimate kinship, and any word expressing relationship or denoting a relative shall be construed accordingly.

"Heritable Property." — Heritable property in cl. 2 (d) of the proposed bill does not include joint family property and therefore succession with regard to joint family property would continue to be governed by the existing rules of Hindu law which exclude female heirs. The necessary result would be that the changed law would provide an ever ready tussle between the male and female heirs. The former would try to show that the

25. The term "agricultural land" is not defined in the Constitution Act.

property passed by survivorship while the latter would aim at proving that it did not. The result of these measures would bring ruin and disaster to Hindu homes.²⁶

Adopted daughter by dancing girl is not entitled to inherit her adoptive mother's gains of profession.—The bill has preserved the customs of the people but where adoption of daughters by dancing girls prevails, and such adoption is legal and not punishable by criminal law, the adopted daughter should be able to inherit her mother's gains of profession. She gets no rights to inherit under the bill. It is necessary to make a change in the bill as the framers of the bill wanted to give rights to women. By not including such daughter, the rights enjoyed by women are taken away by the bill, and this is not in keeping with the general object of reforming the Hindu law by giving better rights to women.

Clause 2 (2) (a).—No restriction on the power of making wills :

The bill deals with intestate succession. But there is no interference with the right of those who do make a will and give their property to whom they please. In England the experience of the people is that many wealthy men gave their property to other women excluding their own widows. The Parliament was, therefore, required to enact a law called Other Womens' Property Act according to which a testator cannot bequeath all his property to others by disinheriting his wife and children. The champions of feminism lost sight of this side of the bill.

Clause 2 (2).—*Domicile*—The question of domicile is already discussed under the heading of Extent of the Code.

Clause 3—*Mitakshara still a good law for the Jains of south of Madras Presidency though bad for other Hindus :*

It is stated already that the Jains in the south of the Madras Presidency were governed by the Aliyasantana law. They found that they could not develop under that system, and so they changed their law and adopted the Mitakshara by Jain Succession Act (Madras 3 of 1929). This Act is not repealed and therefore the Jains would be governed by the Mitakshara. The Jains in Southern India are not fortunate enough to claim the advantages of the present bill.

Clauses 4 and 5—*Devolution of heritable property of males and simultaneous heirs :*

—The principles of Mahomedan law and Indian Succession Act have been introduced in the bill. Clause 5 lays down that the parents, if dependent on the intestate, widow,

son, daughter, son and widow of a predeceased son will inherit as simultaneous heirs.

It is necessary to remember that the structure of the law of succession whether of the Muslims, the Christians or the Hindus is a complete organic structure by itself, and any attempt at dismembering any part thereof or foisting a portion of one on that of other should be beyond the ken of any law-makers. According to Hindu law each individual or group, which comes in that order gets the whole of inheritance. The Mahomedan law or the Indian Succession Act divides the heritage in several parts and among several heirs with the result that the shares are sometimes so small that it is not worthwhile to have them. In a case governed by the Mahomedan law it was found that each parcel of the estate left by the deceased was divided into 23 parts and therefore the Mahomedan law introduced right of pre-emption among the heirs. The bill though providing for the inheritance of a large number of heirs at one time does not provide for the prevention of the infringement of a stranger upon the family property. Suppose a Hindu dies leaving behind him his parents dependent on him, widow, son, daughter and a son and a widow of a predeceased son and one house. Then the house will be divided into six parts according to their proportionate rights. Suppose the daughter marries a Mahomedan, the widow of the deceased marries a Christian and the widow of the pre-deceased son sells her share to a Jew, and all of them stay in the same house, the son or the parents of the deceased have no right to prevent the introduction of the strangers into the family or the family property. As the principles of the law of pre-emption are not embodied in the Code, the other heirs, though capable of purchasing the part of the house, will not be able to enforce their right in the Court of law. The family will consist of co-heirs and discordant elements and the worst will be that the homogeneity of the family will be destroyed.

It may however be noticed that the economic condition of the society whose laws favour the distribution of inheritance in several shares is not sound. In cases of the families governed by the rule of breaking of inheritance the transfer of property is always fraught with suspicion and persons are not prepared to negotiate any kind of transaction because of the fear that an unknown heir may crop up and challenge the transaction. Thus the credit of the society is altogether dried up.

Parents versus children of the deceased :
—The bill puts parents first in the list of

enumerated heirs. This is against all the accepted canons of jurisprudence. Bentham in his theory of legislation gives a model of statute of succession in the form of Code and according to him the property first goes to the descendants and not to ascendants. According to him the reasons for this arrangement are: (a) Pre-eminence in the matter of affection. Any other arrangement would be opposed to the wish of the father. We love those who depend upon us better than those upon whom we depend. (b) It is quite certain that our children could not exist without us or someone who should take our place. It is probable that our parents could exist without us, as they existed before we came into being.^{26a} Parents do not enjoy such a right of precedence in any other system of law.

Expression 'dependent' not defined.—It is necessary to define the expression 'dependent' in the sentence "parents if dependent on the intestate." The absence of the definition or any explanation is likely to give rise to litigation.

Joint succession of son and daughter in the father's property.—In the bill introduced by Dr. Deshmukh an attempt was made to divide the inheritance in several parts by giving rights to several female heirs. The principle of dividing the heritage in several parts was rejected at that time. The report of the Committee does not show any reason why the rejected principles are again embodied in the bill.

As regards the succession of sons and daughters simultaneously it may be said that the rights of a daughter in Hindu family are protected sufficiently. Her right of maintenance and residence and marriage are not dependent on the good will of the parents but a legal duty is cast upon the parents to see that the daughters are well provided for. The question of unmarried daughter or spinsters is not facing the Hindu society at all. Possibly it shall never come for consideration of the Hindus on account of their legal and social systems. It may be remembered that in spite of the Western ideas the Hindu women have as yet not lost their faith in the institution of marriage. This is the case from the very ancient times as would be seen from the immortal words of Kalidas:

"A daughter is a boon, a precious jewel,
Lent to a parent till her husband claims her."

The result of this view is that a girl contracts closer relationship with another man, in whose property she acquires an interest which is, to use the language of Hindu jurist, "like a mixture of milk and water." According to the provisions of this bill a daughter will get property from her father as well as from her husband. This will not conduce to the healthy growth of society, because women will have property without any liabilities while men will have responsibilities without property. It may also be remembered that in legal systems which gave rights to daughters, there was necessarily a provision that she could not marry outside the family or tribe. For example, amongst the Jews there was a rule that a daughter becoming sole heiress must marry within her own tribe. The Solonian legislation provided that when the daughter was the only child, the agnate who took the property should also take her as his wife (11 Bom. H. C. R. 249²⁷ at p. 274). According to Athenian law when an intestate died leaving no son but unmarried daughter, the next kin who claimed inheritance was bound to marry the daughter.²⁸ The marriage of a sister with her brother in ancient Egypt was based on the theory of preservation of inheritance.²⁹ It is needless to point out here that among the Christians and Mahomedans cousin marriages are very popular. The reason is the same as the one stated above.

If the daughters are given a right along with their brothers in the paternal property, it will become necessary to change the law of marriage with regard to prohibited degrees. Whether the Mahomedan law will be a better guide or the Christian law is a disputed question. The wise policy of Hindu law of excluding daughters in presence of sons appeals to reason and commonsense. A jurist of international reputation observes as follows:

"When daughters pass into other families it is not necessary for them to share equally with their brothers in their father's property. For it is foolish indeed to believe that it is opposed to piety, required of father, to distribute his property unequally among those who, one as well as another, were begotten by him."³⁰

Adopted son v. daughter.—In cl. 2 (g) it is defined that the expression son includes a dattaka son. Therefore, in cl. 5, where the enumerated heirs are mentioned, the word son would include an adopted son. The bill provides that a daughter should succeed along

27. (1974) 11 Bom. H. C. R. 249, Bhau Nanaji v. Sundarabai.

28. Hearn's Aryan Household, page 103.

29. Lee's Historical Jurisprudence, page 77.

30. Pufendorf's The Law of Nature and Nations, Vol. 2, Book 4, Chap. 11, page 631.

26a. Bentham, Theory of Legislation, Vol. 1, p. 237, Art. 5. See also Hugo Grotius De Jure Belli A. C. Pacis Libri Tres. Vol. 2, p. 272. Where the opinions of many jurists are cited favouring the rights of children in presence of parents.

with her brothers whether real or adopted. A father can curtail the extent of the right of daughter and the adopted son who is not a son in fact becomes superior to daughter who is born of the father's body. The committee which speaks so loudly about the rights of women has not considered this point of the adopted son, sharing with the daughter. It would have been in keeping with the promise of giving better rights to women, if the rights of an adopted son would have been curtailed or done away with. Under the Oudh Estates Act (2 of 1869) the Privy Council held that the adopted son is not included in the term son: 3 Luck. 76.³¹ Similarly an adopted son is not entitled to perform the *parvana shraddha*, that is, he cannot offer funeral cakes on his mother's side. He is entitled only to perform the *ekoddishtha shraddha*, that is a right in favour of a single ancestor.³² From this point of view the adopted son ought to have been excluded from the line of succession to Stridhan property.

Daughter's position in Mysore. — In Mysore, after an exhaustive enquiry regarding women's rights under the Hindu law it was enacted that the daughters should inherit as a class and should not share with any other relations. (Section 4 of Regulation to amend Hindu law as to Rights of certain women in certain respects (10 of 1933)).

Desirability of dividing female heirs into two classes: (1) Relations by blood and (2) Relations by marriage and giving better rights to relations by marriage. — It is desirable to divide female heirs into two classes, for example, the female relations by marriage and female relations by blood. The relations by marriage should have priority over the relations by blood. In effecting any reform it is necessary to improve the position of female heirs in their husband's family instead of trying to give them some rights in the father's property. This would result in preserving the Hindu family as a unit which would contribute to the peace and prosperity of the community. In a Bombay Full Bench case which was affirmed by their Lordships of the Privy Council it was pointed out that the marriage as well as birth created gotraja relationship for inheritance. This might lead to absurd results, as women inheriting in two families, while men inherited in one, might gradually absorb all the property: 2 Bom.

388³³ at p. 446. Even according to Mahomedan law a mother and a wife are given different shares and a daughter is a residuary and a sister is a sharer or a residuary according to circumstances: 51 Mad. 1³⁴ at p. 26.

Right of auras son born after adoption. — According to the Hindu law as administered to-day in the case of the twice born classes, where, after an adoption, a son is born to the adopting father, the adopted son loses all rights to the performance of religious ceremonies, and his rights in inheritance are reduced: (a) If he be governed by the Bengal school, to one half of the share of a lawfully begotten son; (b) if he be governed by the Benares school to one third of the share of a lawfully begotten son; (c) if he be governed by the schools prevailing in Southern India and Bombay to one fourth of the share of a lawfully begotten son.³⁵ The bill does not provide for such contingency. It is necessary that the law should be clear on these points.

Kritrima son and right of inheritance. — The expression son in cl. 2 (g) includes a kritrima son. The kritrima form of adoption has become obsolete throughout India except in Mithila and some parts of the Punjab subject to the customary law. Either a man or woman can adopt in this form and a wife or widow adopting does not require the assent of her husband or his kinsman. The result of such adoptions is that the adoptee is not considered a member of the adopter's family. He does not assume the surname of his adopter, or forfeit his claim to his own natural family.³⁶ It merely creates a personal relationship between him and the adoptive father or adoptive mother and kritrima son succeeds only to the estate of his father or mother, according to the person who had adopted him.³⁷ Now according to the bill under review a kritrima son will inherit to both his father and mother though only one of them may have adopted him. Similarly, he will inherit to the collaterals of his adoptive father and mother, a right which he does not enjoy under the textual law.

One curious circumstance may come into existence. For example, according to "Dwaita Parishisth" of Keshab Mishra, a person is free to adopt his own brother and even his

33. ('76) 2 Bom. 388 (F.B.), Lallubhai Bapubhai v. Mankuvarbai, affirmed by the Privy Council in ('80) 5 Bom. 110 : 7 I. A. 212 : 4 Sar. 164 (P.C.).

34. ('28) 15 A.I.R. 1928 Mad. 299 : 108 I. C. 760 : 51 Mad. 1 : 54 M. L. J. 174 (F.B.), Vannia Kone v. Vannichi Ammal.

35. Trevelyan's Hindu Law, 3rd Edn., pp. 201-202.

36. Gour's Hindu Code, 4th Edn., p. 269.

37. Gour's Hindu Code, 4th Edn., pp. 267-268.

31. ('28) 15 A.I.R. 1928 P. C. 87 : 108 I. C. 673 : 3 Luck. 76: 55 I. A. 139 (P.C.), Raghuraj Chandra v. Subhadra Kunwar.

32. Dattaka mimansa, Ch. 4, Para. 74 : Setlur's Hindu Law Books, Part 1, Page 291.

own father.³⁸ Such adoptions though valid in Mithila would create much confusion in the law of inheritance. Such adoptions may become popular in cases where a rich man dies leaving behind a widow and no other relatives. In such circumstances the father of the girl may advise her to adopt him and thus secure a right of inheritance in the property for himself. This would indicate how the bill has not been properly conceived.

Moreover the right of adopting in *kritrima* form and *dwyamushyan* form has been extended throughout India, an advantage not asked for by the people.

It may be noticed that the committee was appointed to give better rights to women. The committee extended the right of adoption in *kritrima* form and *dwyamushyan* form. But the committee has done nothing to validate the adoption of daughter, which could be done by enacting that the expression "daughter" includes adopted daughter. If this example, along with other points which are against the rights of women, is considered one will be tempted to say that improvement (?) of the status of women under the Hindu law is only a pretext for doing something which is not warranted.

Undivided and divided son. — The bill lays down that each son of the intestate shall take one share whether he was undivided or divided from, or re-united with the intestate. This rule is not equitable. For generally it happens that a son who separates from the father retains his share or some property and therefore a divided son has no right to his father's estate when an undivided son is there. The result of the present rule will be that the divided would get more than the undivided son — a rule against equity, good conscience and justice.

The contrast: legitimation of illegitimate children in England and other European nations while the bill disinherits Dasee-putra:—Legitimation by subsequent marriage is admitted with different modifications by the law of Scotland, France, Spain, Portugal, Germany, and most of the continental nations in Europe. The rule was imported into their jurisprudence from the Roman law.³⁹ The practice of legitimation of children is now recognised by nearly all the States of United States of America. Since 1910 an illegitimate child has been treated, for purpose of relief accorded to payers of income-tax, as included in the definition of "child" in the Income-tax

Act if the parents have married each other.⁴⁰ It has been remarkable that legitimation by subsequent marriage should have been refused recognition by English law despite the growing tendency to accept it abroad and the spectacle of its existence and recognition in Scotland. The pressure of enlightened opinion has resulted in the attainment of general agreement on the terms of a measure to create legitimation by subsequent marriage in England. The measure is retrospective legitimizing persons whose parents have subsequently intermarried from the date of the commencement of the measure, or from birth, which ever occurs later. Persons claiming to have been legitimated or that their parents, or remoter ancestors, were legitimated under the law, may present a petition for a declaration as may be done under the Legitimacy Declaration Act, 1858 (now consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925). A legitimated person, his spouse, children or more remote issue, shall be entitled to take any interest: (1) in the estate of the intestate dying after the date of legitimation (2) under any disposition coming into operation after the date of legitimation and (3) by descent under an entailed interest created after the date of legitimation in like manner as if he had been legitimate. Provision is also included for inheritance from the legitimated person by parents, for imposing on a legitimated person the personal rights, and obligations as regards maintenance or support of a legitimate person, for placing the spouse and children of a person dying, before the intermarriage of his parents on the same footing as if the parent had died immediately after such marriage, and for the levy of death duties as if the legitimated person were legitimate.^{40a}

But the present bill has disinherited a *dasee-putra*, who stands on a better footing than an illegitimate son. The Sanskrit expression *dasee-putra* has been mistranslated as illegitimate son in many standard works on Hindu law which have created a great confusion in the ideas of the people.

According to Hindu Jurists the filial relationship exists between the *dasee-putra* and the putative father. Such a son does not inherit among the three regenerate castes but is entitled to maintenance. But the great Shoodra community took a more humane

³⁸. Gour's Hindu Code, 4th Edn., p. 270.

³⁹. Story's Conflict of Laws, page 118, Note 2 Edn. 1883.

⁴⁰. Finance (1909-10) Act 1910 (10 Edw. VII Ch. 8), S. 68. Finance Act 1920, S. 21. Cited in Dicey's Conflict of Laws Diew p. 534. Note.

^{40a}. Dicey's Conflict of Laws, Appendix, Note 19, pages 904-905.

view and has put him on a better footing by recognising his rights of inheritance to his father's estate provided his mother was a Hindu and was in the continuous and exclusive keeping of his father and that he was not an offspring of an adulterous and incestuous connexion. This right is not subject to any condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belongs. For example, the illegitimate son of a Shoodra by a dancing woman who was by profession a prostitute before she came into his keeping but who was kept by him in continuous and exclusive concubinage thereafter, is entitled to get his appropriate share in the joint family property after the father's death, provided the connexion between the father and mother was not incestuous or adulterous. This view of the Hindus is more commendable to reason and common sense as would be clear from the following lines of Van Dyke :

"In men whom men condemn as ill
I find so much goodness still;
In men whom men pronounce divine
I find so much of sin and rot,
I hesitate to draw the line
Between the two, where God hath not."

One expected that the learned framers of the bill would have preserved the rights of the dasee-putra not only in the Shoodra community but also extended them to the regenerate castes. Looking to the history of the purpose of the appointment of the committee one may not be wrong in supposing that an illegitimate daughter, used in the same sense as dasee-putra would have been recognised as an heir. The loud talk of giving more and better rights to women is proved futile in this case at least.

Committee devising uniform and common law of intestate succession for all Hindus, but changing the existing uniform and common law in the schools without assigning any reason whatsoever. — In the explanatory note the committee points out that one of the main features of the bill is to introduce a common law, meaning possibly uniform law, of intestate succession for all Hindus in British India. This object is secured by adopting for the most part the Dayabhaga scheme for near succession and the Mitakshara scheme for distant succession and it is pointed out that this kind of compromise would not do great violence to either school. By "near succession" the committee means "the comparatively near relations enumerated in cl. 5 of the bill." This view is open to question because there is already an uniformity of law among all the

schools. The heirs from the widow upto the brother's son are known as compact series of heirs (Baddhakrama).⁴¹ The committee has, without any substantial reason, disturbed the existing uniformity of law of succession in all the schools. Their explanation is not supported by any authority. The laying down of an entirely new order of succession at variance with the existing law will make many well wishers of the committee to exclaim "save us from our friends."

Missing heirs.—The bill does not contemplate the situation arising out of the disappearance of any heir at the opening of inheritance. Should the next heirs come and take the property for their own benefit or should they hold it in trust waiting for the missing heir to return?

Relinquishment of heritage. — The bill is silent regarding the right or otherwise of an heir to relinquish his interest in the inheritance. Can the heir relinquish his interest, if so, who shall come in the line of succession? Can he revoke his relinquishment as Mahomedan can revoke his gift? These are the questions which require explanation.

Hereditary honour or title.—Will a kritrima son adopted by the wife only inherit the honour or title of the husband of the adoptive mother? The bill is silent on this point. If the bill is interpreted in the usual way such a son adopted by the wife only, and creating only personal relationship will inherit the title or honour of the husband of the adoptive mother. Possibly this right was not asked for.

Curtailment of the widow's right of inheritance. — The object of the appointment of the committee was to give better right to women. But in the bill it is seen that the right of inheritance of a widow is curtailed. According to the law as administered a widow inherits along with her son and takes the same share as a son, and in the absence of the son and his heir, she inherits the whole property, that is, she gets 16 annas share in the property.

Now according to the bill a widow is entitled to share with parents, son, daughter, etc., with the result that the share of the widow is reduced. Moreover, these heirs take the interest for themselves so that on their death the property goes to the heirs of the person

41. The following are the heirs who succeed throughout India whether they are governed by the Dayabhaga or Mitakshara. (1) Son, (2) Son's son, (3) Son's son's son, (4) Widow, (5) Daughter, (6) Daughter's son, (7) Mother, (8) Father, (9) Brother, (10) Brother's son.

who inherited the property and other heirs are excluded for ever.

Thus the widow according to the bill will never come in possession of 16 annas share of her husband's property—a feature which may not be appreciated by the public.

Streedhan and widow's right of inheritance:—O Equality! thy name is deception is proved to be true when one compares the rights of inheritance of a widow with those of other heirs in the bill. All the heirs except the widow and daughter, do not get substantial share in the property during the lifetime of the deceased. The widow is in possession of streedhan, which is her absolute property and is in her possession. This streedhan is provided by the husband or his father and no one has any interest in this kind of property. Similarly the father is required to pay heavy dowries in these days and if one takes the trouble of finding out the actual amount spent for the daughter, one would find that this amount is sometimes more than her share given by the bill. If the principle of equality, which is very much in vogue these days, is made applicable, then the widow's share must be found out by deducting the streedhan in her possession and the daughter's share should be reduced by the amount spent on her marriage. This is necessary because the son has more responsibilities from the family point of view while the widow or the daughter can throw away these responsibilities and make themselves comfortable in other families. Curtailment of the right of sons will have very bad effect on the development of society because he who can contribute to the well-being of the family or society has no power to do so.

Birth right of a son in the self-acquired property of father and in the ancestral property a great advance in the emancipation of children. — The sage Yajñawalkya propounded the doctrine of equal ownership of son and father in the property acquired by the grandfather.⁴² The Yogi Vijnaneshwar, the great judicial intellect in his Mitakshara laid down that the property in the father's estate is only by birth, although the father has independent power over the disposal of the effects other than immovables. He is subject to the control of his sons in regard to the immovable estate, whether acquired by himself or inherited from his father, for they who are born, and they who are yet unbegotten, require the means of support, and so, no gift or sale should be made of the same.⁴³ This view

is in advance of other legal systems with regard to the emancipation of son from the *patria potestas* from which children in ancient times suffered most. In accordance with the provisions of the Code of the laws promulgated by Hammurabi, king of Babylon, a debtor could sell his son or daughter for money or he could hand them over "to work off his debt."⁴⁴ In the old Testament it is laid down that a son, "which will not obey the voice of his father, or voice of his mother" shall be stoned to death.⁴⁵ The exclusive, absolute, and perpetual dominion of the father over his children is peculiar to Roman jurisprudence. In his father's house a son was a mere thing. According to his discretion, a father might chastise the real or imaginary faults of his children by stripes, by imprisonment, by exile and so on. The majesty of the parent was armed with power of life and death; and the examples of such bloody executions, which were sometimes praised and never punished, may be traced in the annals of Rome, beyond the times of Pompey and Augustus. Neither age nor rank, nor the consular office, nor honours of triumphs, could exempt the most illustrious citizens from the bonds of filial subjection.⁴⁶ In Athens, at least before the time of Solon, a child could be sold to pay his father's debt.⁴⁷ The Chinese had the custom of selling children whom they thought they could not support.⁴⁸ The French Civil Code enacted that a father can have incarcerated his son for a period not exceeding one month; and for that purpose the President of the Tribunal of the district shall, upon his request, issue an order of arrest. This is with regard to the case of a child who has not entered his sixteenth year. As regards child, who has entered the sixteenth year, or until he comes of his age, or is emancipated, the father can only ask that his child be incarcerated for six months. In either case, there shall be no writing and no proceedings in Court, with the exception

44. World's earliest laws (Code Hammurabi) translated by Chilperic Edwards (1934) para. 117, p. 29.

45. Deuteronomy, Chap. 21, Verses 18 and 21. Deuteronomy is evidently the "Book of laws" which Hilkiah, the high priest of Jerusalem, professed to have found in the Temple in the eighteenth year of Josiah (that is, 621, B. C.).

46. Gibbon's Decline and fall of the Roman Empire, Chap. XLIV, Everyman's Library Series, Vol. IV, pp. 406-407.

Purfendorf's De Jure Nature Et Gentium Libri Octo. Book VI Chap. II, p. 923.

47. Purfendorf's De Jure Naturae Et Gentium Octo, Book VI, Chapter II, p. 922.

Koran, Sale's edition, Preliminary Discourse, pages 93-94, Note 7.

48. Purfendorf, Book VI, Chapter II, page 922.

Bentham Theory of Legislation, Vol. I, page 110.

42. Yajñawalkya Smṛiti, Vyavahara Adhyaya, Shloka 121.

43. Mitakshara, Chap. I, S. i, para. 27.

of the order of arrest itself, in which the reasons shall be stated. If, after the liberation the child again falls back into bad habits, a new incarceration may again be ordered.⁴⁹ According to Benthamite philosophy humanitarian movement sprung up in England which led to the various enactments for the protection of children, of which good example is afforded by the law prohibiting their employment as chimney sweeps.⁵⁰ The spirit of Hindu jurisprudence is entirely different.

The utility of the right by birth can be well understood in language of Eldon, L. C. who said : "the Courts of law can enforce the rights of father but they are not equal to the office of enforcing the duties of the father." And one cannot go to the Court of King's Bench to compel the father to subscribe even the amount of five shillings a year for the maintenance of the child [(1827) 2 Russ. 1⁵¹ at p. 22.] It is the duty of the father to maintain and educate his children, who are incapable of supporting themselves and although the law in India has always recognised this duty, the civil Courts have no direct means of enforcing this obligation, so as to compel him to maintain them out of the property in which they have no interest (55 Cal. 730⁵² at p. 740.) Similarly under the Criminal Procedure Code a father cannot be compelled to educate his children or even to support them according to his own position (55 Cal. 730.)⁵² Therefore, Stanley C. J., of the Allahabad High Court rightly pointed out that the rule of Mitakshara does afford some protection to the son (31 ALL. 176⁵³ at p. 203) where the father is prodigal.

But alas! all this theory is a cry in wilderness. The future generation may bless the present one for the obligations done to them by depriving their legitimate rights by an Act of Legislature!

Women entitled to inherit by the textual law disinherited by the committee without any reason and placed in the same category as murderers who are excluded from inheritance by the committee. — The terms of reference and the historical background behind the appointment of the Hindu Law

Committee show that the task of the committee was to confer better rights on Hindu women. If the bill is looked at from this point of view one would find that so many women are disinherited by the committee from the line of succession and are given the same status as that of murderers who are excluded from the right of inheritance. These women are deprived of their rights though they are not guilty of any homicide. These women are: (1) father's sister, (2) step-mother (father's widow), (3) brother's widow, (4) brother's son's widow, (5) brother's son's son's widow, (6) brother's son's son's son's widow, (7) brother's son's son's son's son's widow, (8) brother's son's son's son's son's son's widow, (9) paternal uncle's widow, (10) paternal uncle's son's widow, (11) paternal uncle's son's son's widow, (12) paternal uncle's son's son's son's widow, (13) paternal uncle's son's son's son's son's widow, (14) paternal uncle's son's son's son's son's son's widow and the widows of the Samanodakas, who are all the agnates of a person from 8th to the 14th degree. All these large number of female heirs are disqualified from inheritance under the present bill and are made to stand on the same footing as that of a murderer though they are not guilty of any homicide or its abetment.

It may also be noted that these widows are entitled to inherit in spite of the fact that their husbands are disqualified to succeed (32 Bom. 275).⁵⁴

No reason is stated for the disinheritance of these widows from the line of succession. The present bill does not fulfil the object of those who were very anxious to give better rights to women. The object of the members of the Legislature was not to take away the existing rights enjoyed by women.

These rights were enjoyed by the women governed by the Mayookha school of law, a school which came into existence when the Marathas were marching from victory to victory. In those days of freedom the women secured so many rights. Let these rights not die.

Rules of inheritance and of exclusion from inheritance are to be considered together. — The rules of inheritance are inseparably connected with the rules of exclusion from inheritance and both these subjects ought to be considered together. The bill deals with only two disqualifications; one of unchastity, which is confined to widows only and the other is of being a murderer or abetting of the commission of murder in fur-

49. French Civil Code, Title X, Of Paternal Authority, Arts. 375-379, Henry Cachard's Edition, p.129.

50. Dicey's Law and Public Opinion in England (1930) page 188.

51. (1827) 2 Russ. 1, Wellesley v. The Duke of Beaufort. Cited in ('28) 15 A.I.R. 1928 Cal. 600 : 111 I. C. 543 : 55 Cal. 730 (740), Victor Justin Walter v. Marie Josephine Walter.

52. ('28) 15 A. I. R. 1928 Cal. 600 : 111 I. C. 543 : 55 Cal. 730, Victor Justin Walter v. Marie Josephine Walter.

53. ('09) 31 All. 176 : 1 I. C. 479 ; 6 A. L. J. 263, Chandradeo v. Mata Prasad.

54. ('07) 32 Bom. 275 : 10 Bom. L. R. 149, Gangu v. Chandrabhagabai.

therance of his or her succession to any property. In the schedule it is stated that the Hindu Inheritance (Removal of Disabilities) Act (12 of 1928) is repealed. This Act governed only the Mitakshara school of law and not the Dayabhaga. It was not made applicable to the Bengal school because the Bengali members of the Legislature were against the measure. Within the short time of 16 years the Bengalis do not seem to have changed their ideas about their legal system. At least Bengal is against this measure as can be seen from the history of the bill. Therefore the measure ought not to be made applicable to the Bengal and Assam where Dayabhaga prevails.

Moreover the idea of allowing a lunatic and a blind man to inherit is not so sound as it appears. It may be an academical question to allow a blind and a lunatic to inherit. It is not possible for them to look after their property and it is well known how the guardians manage the property of their wards. 43 Mad. 4⁵⁵ at page 18.

Reasons for exclusion from inheritance.—The strict injunction to maintain and protect disqualified heirs, and the rule that their sons become sharers show that the exclusion was not intended as a punishment but as a protection to a person incapable of or unwilling to manage property and to deal in secular affairs with others (outcastes being incapable of dealing with their fellow beings) and also in order to prevent vicious persons from squandering wealth in Adharma. Giving shares to such persons would result in property being lost to them.

Streedhan and order of Succession.—In the order of devolution of streedhan the right of husband to inherit the property is postponed though the widow who is in class 1 of the enumerated heirs inherits along with the son. If the equality is the basis of the bill, then the husband's position ought to have been higher in the line of succession.

Succession to the property of dancing girls not codified.—The class of dancing girls and prostitutes has found place in the Hindu community in spite of their existence being repugnant to the higher standard of morality set up by the shastras. The Smritis have, however, regarded them as degraded

class of people, and have condemned and punished also for the persons carrying intrigues with them, but in the nature of things the class existed.

That the members of this class are Hindus is certain though one may find difficulty in fixing them in one of the four castes. The male members of this caste are normally governed by Hindu law; so also when female members may have children, as they sometimes do, their family relation is governed by Hindu law and presumably Hindu law of inheritance will govern succession to their properties. Will the property held by a woman of this class be governed by the rule laid down by venerable Manu, which runs as follows: "But if two (sons) begotten by two (different men) contend for the property (in the hands) of their mother each shall take to the exclusion of the other, what belonged to his father" (Manu Smriti IX, 191.) or will the rule to the nearest sapinda the inheritance next belongs will offer a good guide?

The bill ought to have dealt with this question because of the absence of the definition of daughter in the bill. This omission will give rise to the question whether the adopted daughter is a daughter or not.

Hermits.—The bill does not deal with all kinds of hermits. For example, according to Hindu law a Shoodra cannot become a san-yasi or naistikha brahmacharin. So the line of succession given in the bill shall not apply to them. If the uniformity of law is the object of the Code, then all these people ought to be governed by one law only.

Escheat.—The bill ought to have been based on the recent modifications made in Mahomedan law regarding the law of escheat. It is necessary to modify the bill on that line.

This is not the proper time to deal with Hindu law.—In the end it may be said that in these days of starvation and scarcity, the Hindu nation is not in a position to think properly. It will be in the interest of the nation if the reforming or deforming of Hindu law is postponed till the war is over. It may be remembered that law does not grow into a shapely tree but it grows by jerks. If the Hindu law is codified to-day, it would become necessary to revise the Code after the war because India is at present on the verge of economic revolution. Secondly, when the best brains of India are still behind the prison bars and when the brave sons of the soil are in the battle field, scoring victory after victory in

55. ('20) 7 A. I. R. 1920 Mad. 361 : 53 I. C. 498 : 43 Mad. 4 : 37 M.L.J. 405, Surayya v. Subbamma overruled in ('23) 10 A. I. R. 1923 Mad. 215 : 69 I. C. 313 : 45 Mad. 949 : 43 M. L. J. 596 (F. B.). Where it was held that the rule on congenital blind person is excluded from succession has not become obsolete.

foreign lands, an attempt to reform or deform the Hindu law which has the oldest pedigree

and which has preserved the nation through vicissitudes of fortune, should be given up.

Presumption as to Sunnism &c. in India—how far just ?

by JATINDRA MOHAN DATTA, M.Sc., B.L., F.S.S. (LOND.), Pleader, Alipore.

The law as to presumption of the different sects and sub-sects of the Muhammadans in India has been stated thus in Sir Dinshaw Mulla's Muhammadan Law (Edn. 11 by Sir George Rankin) :

"Presumption as to Sunnism.—The great majority of the Muhammadans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis, unless it is shown that the parties belong to the Shiah sect. As most Sunnis are Hanafis the presumption is that a Sunni is governed by Hanafi law. As most Shiahs are Athna-Asharias the presumption is that a Shiah is governed by the Athna-Asharias exposition of the law." (See p. 20 ; paras 19 and 20).

The authorities quoted in support of the above propositions are : 30 Cal. 683¹ at p. 686; A.I.R. 1933 Lah. 80;² 34 Bom. L. R. 655.³ Let us examine the decisions a little in detail. The earliest decision is that reported in 30 Cal. 683.¹ It is a judgment by Banerji and Geidt JJ. in a second appeal coming from the metropolitan district of the 24 Parganas (Bengal). The relevant portion of the judgment is :

"It is not shown that the parties to this case are Shiahs. It is not even *alleged* before us in the *argument* (italics ours) that they are so, and in the absence of any such allegation, there is a presumption that the parties are Sunnis, to which sect the great majority of the Mahomedans of this country belong, as has been pointed out by Baillie in the Introduction to his Digest of the Imamea law."

The opinion is more an obiter dicta; and the reason for the presumption is that the great majority of the Muhammadans 'in this country' (Bengal or India — which?) are Sunnis; and the authority for the fact is the statement of Baillie made before the earliest of censuses took place.

In the next case, which comes from the Punjab, Harrison and Addison JJ. of the Lahore High Court give no reasons but tacitly assume the presumption and say that "the burden was rightly put upon the defendants to prove that the deceased Hakim was a Shiah."

In the Bombay case, Tyabji J. states the law thus :

"As the great majority of the Mussulmans in India follow the Hanafi school of Sunni law, the Courts presume that Muslims in India follow the Hanafi law unless the contrary is alleged and proved. Similarly the presumption is that if the parties are Shiahs, they are governed by the Shiah law. The great majority of Shiahs in their turn being Ithna Asharis their exposition of the law is enforced, unless the parties show that their particular rule is different. These are presumptions based on the numbers of the followers of each section on the principle of providing for the ordinary course of things, "*in ea quæ fræquentius accidunt præveniunt jura*:" or *ad ea jura adaptandum* : (1871) 6 Ex. 132⁴ at p. 172."

We question the justness or propriety of the above presumptions being drawn mainly on three grounds : (1) first, there never has been a survey, at least any exhaustive survey, as to the respective numbers of the Shiahs and the Sunnis throughout India, far less of their sub-sects; (2) secondly, 'the principle of providing for the ordinary course of things' or that 'the laws are adapted to those cases which more frequently occur' should not be and cannot be applied when it is a question of applying the personal laws to the parties; and (3) lastly, these presumptions are not presumptions of universal application, capable of being applied to all parts of India irrespective of the local conditions.

We shall deal with the last objection first. When Oudh was annexed to the British dominions it was found that,

"the Sheeahs had acquired so great an ascendancy that they were found numerically to preponderate very much over the other sect of Mussulmans." (See Correspondence relating to Native Laws in Oudh p. 3)."

Locally in Oudh, the Shiahs are in a preponderating majority over the Sunnis. Even assuming that they are not in a majority but are substantial minority there in Oudh, would it be just or politic to apply the presumption that a Muhammadan will be presumed to be a Sunni? Nor will it be just to hold the contrary presumption that in Oudh a Muhammadan shall be deemed to be a Shiah, because they are in an overwhelming majority over there.

1. ('03) 30 Cal. 683, Bafatun v. Bilaiti Khanum.

2. ('33) 20 A.I.R. 1933 Lah. 80 ; 140 I. C. 829 ; 34 P. L. R. 24, Mt. Iqbal Begum v. Mt. Syed Begum.

3. ('32) 19 A.I.R. 1932 Bom. 356 : 138 I. C. 810 : 57 Bom. 551 ; 34 Bom. L. R. 655, Akbarally v. Mahomedally.

4. (1871) 6 Ex. 132 : 40 L. J. Ex. 57 : 24 L. T. 149 : 19 W. R. 527, Maxted v. Paine.

Hamilton in his Introduction to the Hedaya (p. 20) says :

"The Mussulman Princes of Hindostan are, in general, Soonis, as well as most of their chief men, the heads of the law, or the ministers of state, whilst the great body of Mohammedans, being descended from a Persian stock, or from the proselytes of the first Mohammedan conquerors, adhere rigidly to the principles of the Shiyas — The Nizam, one of the most powerful and independent of those princes, cannot attend public worship in the Jama mosque of his capital (Hyderabad) because of the Anathemas weekly uttered there against the usurping Khalifs of the house of Ommiah. — At Lucknow, on the tenth of Moharrim, the effigy of Omar (who, as being the first proposer of an elective Khalifat, in prejudice to the right of Alee, is regarded by his adherents with particular abhorrence), is set up, filled with sweet-meats, as a mark to shoot at; and after being used with every species of indignity, is torn to pieces, and its contents devoured by the enthusiastic votaries of Alee."

So in Oudh and Hyderabad the Shiahhs are in a local majority. The late Rt. Hon. Syed Ameer Ali in his Mahomedan law, vol. 2, p. 37 makes this pertinent observation with regard to the presumption made in 30 Cal. 688¹ at p. 686 :

"This dictum must be accepted with some degree of reservation. In some parts of the country the Shiahhs preponderate in numbers ; it would be difficult in those districts to make any such presumption. It is submitted that in every proceeding involving a question of Mahomedan law, the Court should require the parties to state to which school of law, they are subject; and in case of difference to adduce evidence in support of their respective allegations, and then decide by what law the question at issue is to be determined."

Then again the Shiahhs are not such a hopeless minority in India as the above presumption as to Sunnism would lead us to suppose. William Cantwell Smith in his Modern Islam in India says : "Approximately one out of every thirteen Muslims in India is a Shia." (See p. 328).

Similarly the presumption that a Sunni is governed by the Hanafi law is not of universal application. Shafeism is to be found among the Muhammadans of the Malabar coast and Ceylon, in Northern Africa and in Egypt, which is its principal stronghold in Southern Arabia and the Malayan peninsula and Java.

"In recent years his (Shafei's) doctrines have made great progress in India (italics ours) and his followers are found among all ranks of Mahomedan society." (See Ameer Ali, Mahomedan Law, Vol 2, p. 17.)

Jurisprudence states that followers of the Shafei School are to be found "in India, especially in Bombay and Madras." (See p. 27). In Bombay the Chief Kazi was generally a Shafei until the post was abolished. The Mapillas of Malabar are Shafeis; and so are the traders with Zanzibar and the Hadramaut coast.

We now come to the second objection that 'the principle of providing for the ordinary course of things' or that 'the laws are adapted to those cases which more frequently occur' cannot be applied when it is a question of applying the personal laws to the parties. In India there is no territorial law in regard to certain matters, e. g., succession, marriage &c. Personal laws of the parties prevail. All the systems of personal law, whether Hindu, Mahomedan or Buddhist, are on the same equal footing. Why then presume one system of personal law to prevail over another? In Bengal the Dayabhag School of Hindu law prevails ; it is the law of the Bengalee Hindus. Why not then on the principle of providing for the ordinary course of things presume the Dayabhag law to be applicable to the up-countrymen settled here in Bengal for generations? Why not on the principle that the laws are adapted to those cases which more frequently occur apply the Mitakshara to the Bengalee settlers, necessarily very few in numbers, in the sacred cities of Benares and Brindabon (in the United Provinces)? There is no such presumption as that the Mayukha School of Mitakshara shall prevail over the Dravira School in the Marhatta country, or that the Benares School will prevail over the Dravira in the United Provinces or Bihar. The real matter is that such principles are incapable of application to personal laws. They are wholly unsuited to the fundamental basic conception which underlie the enforcement of different systems of personal laws within the same territory. Why then make an exception in favour of a particular section or a particular sub-section of the Mahomedans?

These presumptions are more rules of evidence than of substantive laws; and as such their application to a given set of facts depends largely upon the mind of the judge. One judge may think the presumption to be displaced by very slight evidence; another judge may require overwhelmingly strong evidence of unimpeachable kind to displace it. This leads to a certain amount of uncertainty in the mind of the community—a result to be avoided by all means.

On the other hand if they are regarded as items of substantive law, then law unduly favours one section or sub-section of the Mahomedans at the expense of another. While it is of no advantage to the majority (for the presumption is applying the law of majority to the majority) it is irksome to the followers of the minority school, especially if they are isolated and ignorant or illiterate. An isolated Shiah dying in Eastern Bengal will have his

estate administered according to Hanafi Sunni law; and it will ordinarily be very difficult for his heirs to prove that the deceased was a Shiah.

We shall now discuss the first objection. The factual basis of the decision in 30 Cal. 683¹ at p. 686 is Baillie's statement that "the Mussulmans of India are generally Soonees of the Hanifite sect." This statement is both correct and incorrect. It is correct as a general statement of fact; it would be incorrect to infer from this loose general statement that the other sub-sects of the Sunnis or the Shiahs are quite negligible in number. As has been already stated one out of every thirteen Mahomedans in India is a Shiah; i. e., the Shiahs are quite 8 per cent. of the total Mahomedan population.

How very erroneous such a general statement may be we shall illustrate by examples taken from the Census. In 1787 Sir William Jones thought the population of Bengal (including those of Bihar and part of the present United Provinces then attached to it, viz., the Benares Division) to be 24 millions. Five years later Mr. Colebrook placed it at 30 millions. In 1835, 43 years later, Mr. Addams assumed it to be 35 millions, but this estimate was thought to be too high and was reduced to 31 millions in 1844. In 1870 the population was held to be about 42 millions; while the first regular census of 1871-72 disclosed the population to be 62 millions—an excess of about 50 per cent. over the estimate made only two years previously. Sir Edward Gait in the Bengal Census Report of 1901 observes:

"Prior to the enumeration of 1872 it was thought that Mahomedans were most numerous in Bihar, but it was then clearly established that this is by no means the case, and that the Mussulmans of Bihar are greatly outnumbered by those of Bengal proper." (See page 156).

For every Mahomedan in Bihar there are seven or eight Mahomedans in Bengal. If such grave mistakes in the estimates can be

made with regard to the religion of a given region or a given population, how easier it is to err when estimating the proportion of a sect, or a sub-sect—especially if we remember how differentiated Islam is from Hinduism; while the differences between the sects or sub-sects are small and far less fundamental.

There never has been a complete census of the Shiahs and the Sunnis, far less of any sub-sects among them in India. In 1921 an attempt was made in most provinces "to obtain approximate figures" of the Shiahs and the Sunnis. The information obtained is tabulated below;

Province, State, &c.	Percentage of	
	Sunnis	Shiahs
1. Assam	100	*
2. Baluchistan	96	1
3. Bengal	99	1
4. Bihar & Orissa	99	1
5. Bombay	88	3
6. C. P.	98	2
7. Madras	94	2
8. N-W. Frontier Province	95	4
9. Punjab & Dehli	97	2
10. Baroda	88	10
11. Kashmir	95	5
12. Rajputana & Ajmer	98	2

(See Census of India Report, 1921 p. 120).
"but complete figures for the whole of India are not available. The Sunnis form in all provinces the vast majority. The Shiahs are a dwindling community and are usually found among the middle and lower classes of the Mahomedan population. Their chief adherents in Western India are the Khojas and Bohras. In Madras the majority of Shiahs are Sheikhs by tribe, though in Tanjore many are Labbais while in Malabar all persons who claim to belong to the Shiah sect are either Mappillas or Labbais. The trustworthiness of the return of Shiahs must always be suspect as their religion allows them to conceal their sectarian identity, a privilege of which, owing to the contempt and hatred with which they were frequently regarded by the Sunnis, they freely availed themselves in the past." (See Census of India Report, 1921, pp. 119-120.)

(To be continued.)

REVIEW

The Government of Jind State Act, 1944 (*Jind Act No. 1 of 1944*), Published by Jind State, Sangrur. Price : One Rupee.
We have received a copy of the English version of the Government of Jind State Act, 1944 (*Jind Act No. 1 of 1944*) which deals with

the law relating to the administration of Jind State. The provisions regarding the formation of the Executive, Legislature, Finance, Judiciary, etc., appear to be similar to those prevalent in some of the important States like Mysore, Travancore and Cochin.

Presumption as to Sunnism &c. in India—How far just ?

by JATINDRA MOHAN DATTA, M.Sc., B.L., F.S.S. (LOND.), *Pleader, Alipore.*

(Continued from page 32.)

It will be noticed that besides the Shiah and the Sunnis there are other sects of the Mahomedans, especially in Baluchistan, Bombay, Baroda and Madras. Another interesting fact is that the proportion of the Shiah is generally higher in the Hindu Native States. In the above Table, the two most important Shiah strongholds, the United Provinces of Agra and Oudh and the Nizam's Dominions have been left out besides Central India, Mysore, Travancore and other tracts. The real number of Shiah is far greater than that recorded in the Census. There are a large number of ignorant and poor Mahomedans, who are presumed to be Sunnis, but who may be either Sunnis or Shiah. The determination of their sect has been left to the arbitrary will and convenience of enumerators, a large majority of whom were Hindus wholly ignorant of the sectarian differences among the Mahomedans. The Bihar and Orissa Census Superintendent admits "that the census statistics for Shiah are inaccurate."

There has been no enquiry whatsoever by any competent authority as to the sub-sects of

either the Sunnis or the Shiah in India. We have to rely on the vague general statements of men untrained in the art of estimating numbers or their proportion.

For the above reasons we submit that presumptions as to Sunnism or as to Hanafism are not proper presumptions to draw in a Court of law. They work injustice in some cases at least. Instead of relying upon presumptions as guides for applying particular school of Mahomedan law to the parties, the Courts should follow the method suggested by the late Rt. Hon. Syed Ameer Ali, viz., require the parties to a case to state to which school of law they are subject, and in case of difference to adduce evidence in support of their respective allegations. Lastly we suggest that there should be an exhaustive survey of the different sects and sub-sects of the Mahomedans in India. This survey will be of great historical and sociological importance. Such a survey is both possible and easy. There has been a survey of sects among the Hindus in Bengal.

LIMITATION IN SUITS FOR POSSESSION BY OWNER

by V. B. RAJU, I. C. S., *Ahmednagar.*

Although the object of legislation is to make law simple and clear, as a matter of fact we find that the results are sometimes the opposite. By providing Articles 136 to 144 in Sch. 1, Limitation Act, in regard to suits for possession the authors in my opinion have not only complicated the law but led to a conflict of opinion. The writer ventures to suggest that the law relating to limitation in suits for possession by owners can be simplified and also to question the correctness of the interpretation put on Art. 142.

Upon the application of Arts. 142 and 144 there has been a conflict of opinion among various High Courts in India. There is no case decided by the Privy Council in which the two articles have been discussed together with a view to laying down in what cases one article applies and in what cases the other applies. The two conflicting views taken by the High Courts may be summarised thus: According to one view, Art. 142 applies to suits of what may be called possessory title i.e., to suits where relief for possession sought by the plaintiff is based merely on previous possession within 12 years before the suit and not on title. According to this view Art. 142

does not apply to suits in which title is alleged.

According to the other view, Art. 142 applies to all suits where there is an allegation of dispossession, or discontinuance of possession of the plaintiff, irrespective of the fact whether title is also alleged by the plaintiff.

Where the suit is based only on title and not on previous possession followed by dispossession or discontinuance of possession, it is Art. 144 that applies according to either view; where the plaintiff does not allege title but only alleges previous possession or discontinuance of possession, then also there is no difference of opinion as to the applicability of Art. 142 to such suits.

It is only in regard to suits where the plaintiff alleges title as well as previous possession and dispossession or discontinuance of possession that the applicability of Art. 142 or 144 is doubtful.

It is unnecessary to enumerate all the cases decided by either school of thought. It is sufficient however to refer to the case in 51 ALL. 1042¹ where the view has been taken that

1. ('29) 16 A. I. R. 1929 All. 753 : 119 I. C. 6 : 51 All. 1042 : 1929 A. L. J. 1106, Kanhaiya Lal v. Girwar.

Art. 142 applies only to suits purely based on possessory title and to the case in 57 ALL. 278² where the view taken is that Art. 142 applies to all suits where the plaintiff alleges previous possession, or dispossession or discontinuance of possession irrespective of the fact whether in addition he alleges title. The Bombay case which takes this latter view is the one in 40 Bom. L.R. 166.³ In that case it is observed as follows :

"The first question which arises in this case is, whether the suit falls within Art. 142 or Art. 144, Limitation Act. It is clear that these two articles apply to two different sets of circumstances. Article 142, on the face of it, is restricted to a suit based on the plaintiff's prior possession lost by dispossession, and in order to bring the suit within Art. 142, the plaintiff must allege that he was originally in possession of the property which is the subject-matter of the suit, and that he has been dispossessed by the defendant. In other words, he must prove that he was dispossessed within twelve years. The whole question under Art. 142 is, whether more than twelve years have elapsed since the plaintiff was dispossessed; and, if the plaintiff fails to prove that — the onus obviously being upon him — the defendant is not called upon to set up his adverse possession. Article 142 makes no reference to the defendant or to his possession. That is done in Art. 144. Article 144 is a residuary article, and only applies if no other article is applicable. The article, in my opinion, applies only when there is no allegation in the plaint that the plaintiff has been in possession and has been dispossessed. It applies when the suit is based on the ground that the plaintiff is the owner of the property and the defendant is a trespasser having no right to remain in possession."

The same view was taken in 16 Cal. 473⁴ and 17 Cal. 137.⁵

The case in 51 ALL. 1042¹ has been considered by the Full Bench case of 57 ALL. 278² and overruled. But I venture to respectfully suggest that the Full Bench decision in 57 ALL. 278² needs to be reconsidered and that the view taken in 51 ALL. 1042¹ is the correct one. I shall attempt to show that the view taken in 57 ALL. 278² leads to many anomalies and also that the contrary view is more in accord with the natural meaning of the words used in Art. 142. Before doing so, however, I may mention that if the view taken in 57 ALL. 278² is really correct, all suits filed by landlord after the determination of the tenancy against a tenant who denies the title of the landlord would fall under Art. 142 for the denial by the tenant of the landlord's

title after the termination of the tenancy amounts to dispossession. A mere refusal to recognise the true title amounts to dispossession : *vide* 17 Cal. 137.⁵ If therefore the view taken in 57 ALL. 278² is correct all the cases which refer to the adverse possession of tenant against the landlord or of a third party against the landlord would not be sound because there can be no adverse possession in cases falling under Art. 142 : 16 Cal. 473.⁴

For similar reasons there can be no question of adverse possession of a mortgagee against the mortgagor because the mortgagee's possession is either permissive or under an agreement and does not constitute dispossession or discontinuance of mortgagor's possession: 8 Rang. 556,⁶ 6 Cal. 311,⁷ and 41 Bom. 5.⁸ There is dispossession when the permissive possession ceases to be permissive or where possession under an agreement ceases to be in pursuance of the agreement. If the view taken in 57 ALL. 278² is correct, then all the cases which refer to the adverse possession of the mortgagee against the mortgagor would not be sound in law because in such cases the suit by the mortgagor would fall under Art. 142 and not under Art. 144 because in all such cases there is dispossession of the plaintiff-mortgagor while in possession. Similarly the decisions which refer to the adverse possession of a third party against the mortgagor and mortgagee are also not sound as in all such cases Art. 142 would apply.

That the view taken in 57 ALL. 278² would lead to gross absurdities can be seen from the two following hypothetical cases :

(1) C is entitled to a land on the death of B, widow of A. B is dispossessed by X in 1900 and dies in 1920. C files a suit against X for possession. According to the view taken in 57 ALL. 278² as plaintiff derives his right to sue X from or through B and as B was dispossessed Art. 142 would apply and the suit would have to be dismissed.

(2) C is entitled to a land on the death of B, widow of A. A is dispossessed in 1900 by X and dies in 1901 leaving his widow B surviving. A and B take no steps to recover possession and B dies in 1920. C files a suit in 1921. If the view taken in 57 ALL. 278² is correct, there is no doubt that Art. 142 would apply to both or at least to one of the above cases, a result which could never have been ima-

2. ('34) 21 A. I. R. 1934 All. 993 : 152 I. C. 1 : 57 All. 278 : 1934 A. L. J. 973 (F.B.), Bindhyachal Chand v. Ram Gharib Chand.

3. ('38) 25 A.I.R. 1938 Bom. 210 : 175 I.C. 93 : 40 Bom.L.R. 166, Naru Shidu v. Krishna Shidu.

4. ('89) 16 Cal. 473 : 16 I.A. 23 : 5 Sar. 321 (P.C.), Mohima Chunder v. Mohesh Chunder.

5. ('90) 17 Cal. 137 : 16 I.A. 148 : 23 P. R. 1890 : 5 Sar. 412 (P.C.), Nawab Mahomed v. Badal Singh.

6. ('31) 18 A. I. R. 1931 Rang. 40 : 129 I. C. 511 : 8 Rang. 556, Maung Sin v. Maung So Min.

7. ('81) 6 Cal. 311 : 7 C. L. R. 181, Gobind Lal v. Devendranath.

8. ('16) 3 A.I.R. 1916 Bom. 159 : 36 I. C. 715 : 41 Bom. 5 : 18 Bom. L. R. 810, Ibrahim v. Isa.

gined by those in favour of the correctness of the view taken in 57 ALL. 278.²

The natural result of the view taken in 57 ALL. 278² would be to hold that Art. 142 applies to suits for possession by the landlord against a tenant whose tenancy has expired or against a trespasser from the tenant or suits for possession by mortgagor against the mortgagee after the redemption of the mortgage or against trespassers and such a result would lead to great injustice and the decisions in 27 ALL. 395,⁹ 30 ALL. 119,¹⁰ 38 ALL. 411,¹¹ 43 ALL. 164,¹² 18 Bom. 51,¹³ 35 Bom. 438,¹⁴ 49 Bom. 539,¹⁵ 21 Mad. 153¹⁶ and 38 Mad. 903¹⁷ would have to be regarded as incorrect.

It has been held in various cases that the applicability of Art. 142 or 144 of Sch. 1 has to be determined by having regard to the plaint. In 40 Bom. L. R. 166³ Rangnekar J. observed as follows :

"It seems to me that before determining which article would be applicable to the facts in this case, the Court should have before it a translation of plaint. Reading the plaint, I am quite clear in my mind that the suit must fall within Art. 142. The plaintiff after setting out the facts to which I have referred, states in the plaint that he and defendants 1 and 2 are the owners of the property. Then he refers to the decree obtained by defendant 3 and says that defendant 3 has now obtained possession of the property and that such possession is wrongful. This must in my opinion mean that the plaintiff has been dispossessed by defendant 3. I think the lower Courts were right in holding that this was a suit of ejectment under Art. 142. It is clear from the record that the plaintiff's case was that he was in possession and has been dispossessed within 12 years. The suit falls under Art. 142."

In 57 ALL. 278² also the following observations by Mukerji J. are interesting :

"If on the allegations made in the plaint the suit falls under Art. 142, I see no justification for taking it out of that article and for applying Art. 144 on grounds which are not to be found mentioned in Art. 142 itself."

9. ('05) 27 All. 395 : 1905 A. W. N. 4, Muhammad Hussain v. Mulchand.

10. ('08) 30 All. 119 : 1908 A. W. N. 25 : 5 A.L.J. 85, Ismdar Khan v. Ahmad Husain.

11. ('16) 3 A. I. R. 1916 All. 79 : 34 I. C. 171 : 38 All. 411 : 14 A. L. J. 498, Kunwar Sen v. Darbari Lal.

12. ('21) 8 A. I. R. 1921 All. 389 : 61 I. C. 546 : 43 All. 164 : 18 A. L. J. 995, Mt. Ram Piari v. Budh Sen.

13. ('94) 18 Bom. 51, Chinto v. Janki.

14. ('11) 35 Bom. 438 : 12 I.C. 362 : 13 Bom. L.R. 867, Sambu Hanumantha v. Nama Narayan.

15. ('25) 12 A. I. R. 1925 Bom. 465 : 87 I.C. 765 : 49 Bom. 539 : 27 Bom. L. R. 441, Tarabai Ramrao v. Dattaram Govindbhai.

16. ('98) 21 Mad. 153 : 8 M. L. J. 92, Ittapan v. Manavikrama.

17. ('14) 1 A.I.R. 1914 Mad. 334 : 22 I.C. 615 : 38 Mad. 903 : 26 M. L. J. 140 (F.B.), Peria Aiya v. Shanmuga Sundaram.

Mukerji J. has further observed as follows:

"The first column of the First Schedule of the Limitation Act is headed as description of suits, the second column provides for the period of limitation and the third column provides the date from which the limitation is to be counted. The description of suit could naturally mean the allegations on which the plaintiff has brought his suit and on which he seeks relief. Primarily therefore the article to be applicable is to be chosen with regard to the facts stated in the plaint."

This view along with the view taken in 57 ALL. 278² regarding the applicability of Art. 142 to a suit for possession based on title would lead to an anomaly as can be seen from the following illustration: A gets title to a land in 1900. He also gets possession of the land but is dispossessed in 1905 by P. P is again dispossessed by Q in 1910. A files a suit against Q in 1920, i.e., 15 years after he was dispossessed. In the plaint he makes no mention of his previous possession or dis-possession. At the trial he proves his title. Is Art. 144 to be held to be applicable, in which case the burden of proving 12 years' adverse possession would be upon Q? But as Q has been in possession for only 10 years prior to the suit, he cannot prove 12 years' adverse possession. The result is that plaintiff A would succeed, although he was dispossessed more than 12 years prior to the date of the suit.

Defendant cannot add to his own adverse possession the adverse possession of another independent previous trespasser from whom he did not derive his liability to be sued within the meaning of the definition of 'defendant' in s. 2 (5) and whom he does not represent by birth, transfer or devise : 61 Cal. 262,¹⁸ 45 Bom. 570,¹⁹ 5 ALL. 1²⁰ at p. 7. The defendant cannot tack to his possession the possession of another person whom he has dispossessed : 35 Bom. 79²¹ at p. 90.

To extend the same illustration, let us suppose that A acquires title to two lands in 1900 and also acquires possession of both the lands. He is dispossessed in 1905 by P, who in turn is dispossessed in 1910 by Q. A files two suits against Q in respect of the two lands. In one of the suits, he states the full facts, namely that his title was acquired in 1900 and that he was dispossessed in 1905. In the second plaint he merely alleges his title to the lands

18. ('34) 21 A.I.R. 1934 P. C. 23 : 147 I. C. 545 : 61 Cal. 262 : 61 I. A. 78 (P.C.), Secy. of State v. Debendra Lal Khan.

19. ('21) 8 A.I.R. 1921 Bom. 48 : 59 I. C. 805 : 45 Bom. 570 : 22 Bom. L. R. 1452, Ramachandra Balwant v. Balaji Ganesh Sons & Co.

20. ('83) 5 All. 1 : 9 I. A. 99 : 4 Sar. 382 (P.C.), Karan Singh v. Bakar Ali Khan.

21. ('11) 35 Bom. 79 : 8 I. C. 639 : 12 Bom. L. R. 956, Vasudeo v. Eknath.

and makes no mention of dispossession or discontinuance of possession. According to the view taken in 57 ALL. 278,² Art. 142 would apply to the first suit and Art. 144 to the second suit. In the second suit as Q was in possession only for 10 years from 1910 to 1920, he cannot prove 12 years' adverse possession and plaintiff would succeed. But in the first suit, according to 57 ALL. 278² Art. 142 applies, and as plaintiff was dispossessed 15 years before suit he fails. Thus we get two different results in exactly the same circumstances, simply because in one plaint the plaintiff has stated the true facts and in the other the plaintiff has concealed the true facts. In the suit where the plaintiff has stated the true facts he fails; whereas in the suit in which he

has concealed the true facts he succeeds.

Another interesting question which arises from the two illustrations is: Notwithstanding that the defendant does not prove his adverse possession for 12 years, is it open to the defendant to show that the plaintiff was in fact dispossessed by some one more than 12 years prior to his suit and then to argue that the suit falls under Art. 142 and not under Art. 144? What of the case where plaintiff alleges title as well as dispossession and defendant denies that the plaintiff was ever in possession? If the view taken in 57 ALL. 278² is correct, Art. 142 would apply on the basis of the plaint and Art. 144 on the basis of the written statement.

(To be continued.)

REVIEW

The Bombay Industrial Disputes Act, by PRABHUDAS BALUBHAI PATWARI, B.A., LL.B., *Advocate*, with Prasanndas Damodar-das Patwari, LL.B., *Advocate*, Bombay. Copies can be had from Chandrakant C. Vora, Law Publisher & Bookseller, Gandhi Road, Ahmedabad. Pages 191. Price Rs. 8.

The author has explained the various provisions of this important piece of legislation, which is a bold and unique attempt to bring about a settlement of industrial disputes by the methods of conciliation and arbitration; and all important decisions have been referred to under appropriate sections. Rules and forms under the Act, Standing orders, Notifications, etc., have been usefully given in the Appendices. The book is bound to be very useful, particularly to lawyers, labour organisations and to people concerned with the administration of the Act.

The Debt Laws in U. P. (Second Edition), by SHAMBHU DAYAL SINGH, M.A., LL.B. Copies can be had from Ram Narain Lal, Law Publisher, Allahabad. Pages over 300. Price Rs. 5.

In this edition the author has revised the commentaries to the Acts incorporated in the book with reference to case law which has

been brought up to date. The Acts dealt in the book are the U. P. Debt Redemption Act, the U. P. Regulation of Agricultural Credit Act, the U. P. Agriculturists' Relief Act and the Usurious Loans Act as amended by U. P. Act 23 of 1934. The Rules under the Acts have also been given. The principles underlying the sections have been clearly stated in the body. The U. P. Temporary Postponement of Execution of Decrees Act, the Interest Act, relevant provisions of the Negotiable Instruments, the Contract and the U. P. Encumbered Estates Acts have been usefully included in the Appendices.

Case Law under the Defence of India Act and Rules, by K. RAMASWAMI AYYANGAR, B.A. B.L., *Advocate*, Chittoor. Copies can be had from author himself. Pages 18. Price annas eight.

The author has in this booklet reviewed about 70 cases under the Defence of India Act and the Rules framed thereunder under proper subject headings. The inclusion of the text of the Defence of India Act and the Defence of India Rules would have considerably enhanced the utility of the publication but the author says he could not do so on account of scarcity of paper. The price of the book is very moderate.

LIMITATION IN SUITS FOR POSSESSION BY OWNER

by V. B. RAJU, I. C. S., Ahmednagar.

(Continued from page 36.)

The observations of Mukerji J. in 57 ALL. 278² that the article of limitation to be applied is to be determined with regard to the facts alleged in the plaint is in my humble opinion subject to the qualification that the facts stated in the plaint are proved to be true. In the following cases too it was held that if there is no allegation of possession in the plaint, lost by dispossession or discontinuance of possession, Art. 142, cannot apply, but the suit falls under Art. 144 : 35 Bom. 79;²¹ 8 Cal. 224²² at p. 229 ; 39 Bom. 335.²³ But it appears that the allegation may be made by the defendant. For instance, it was held that where the plaint does not plead dispossession and it is not found that plaintiff was actually dispossessed, the suit falls under Art. 144 and not under Art. 142 : see 47 ALL. 389 ;²⁴ 50 ALL. 89.²⁵ The question whether the article applicable to a particular case is Art. 142 or Art. 144 has to be decided by reference to the pleadings : A. I. R. 1934 Oudh 21.²⁶ Where the description of the suit for purposes of limitation depends only on the nature of the remedy sought, the article of limitation depends on the allegations made in the plaint ; but where the description of the suit depends on the nature of the relief claimed as well as on certain allegations of fact contained in the plaint, the article of limitation has to be chosen upon such allegations provided the facts alleged are true. For instance, if a plaintiff files a suit on a promissory-note against a defendant on the allegation that the defendant is an agriculturist to whom the Deccan Agriculturists' Relief Act is applicable, the period of limitation would be 6 years, only if the plaintiff proves that the defendant is an agriculturist.

The view taken in 57 ALL. 278² would also lead to another anomaly and that is this : In suits falling under Art. 142, the last of several but independent trespassers may defeat the owner's title although he himself has been in

possession for only a few days before the date of suit, provided the total duration of possession of all the independent trespassers exceeds 12 years (40 Bom. L. R. 166).³

Under S. 2 (8), Limitation Act, plaintiff includes any person from or through whom a plaintiff derives his right to sue. In all cases in which plaintiff alleges title and sues for possession, either the plaintiff must have been dispossessed or his predecessor-in-title must have been dispossessed ; that is, either the plaintiff or the person from whom he derives his right to sue must have been dispossessed and therefore Art. 142 applies to all suits in which plaintiff alleges title and sues for possession. The only exceptions are where defendant happens to be the predecessor-in-title of the plaintiff or where the predecessor-in-title of the plaintiff has been in possession up till his death. In 50 Cal. 49²⁷ the original owner was in possession up to his death and the plaintiff derived his title from the will of the original owner and sought to recover possession on the strength of the will ; it was held that Art. 144 applies. But, in my view, the decision is wrong because between the time of the original owner's death and the defendant's possession there must have been some interval during which the plaintiff who is entitled to the land must be presumed to be in possession. Therefore all suits based on title excepting suits where plaintiff sues his predecessor-in-title for possession will have necessarily to fall under Art. 142 and no suit other than a suit against plaintiff's predecessor-in-title would fall under Art. 144 unless it be held that the article of limitation which applies does not depend on the actual facts but on the facts alleged in the plaint whether they be true or not and even if they are disproved.

The view taken in 57 ALL. 278² would encourage persons who are entitled to immovable property but who have been dispossessed more than 12 years previously to take forcible possession of such property and thereby get round the difficulty caused by the interpretation put by Courts on Art. 142. When a plaintiff's title is once established, his possession, however obtained (whether it is taken forcibly or not), would be possession within the meaning of Art. 142 : 9 C. W. N. 1061²⁸ at

22. ('82) 8 Cal. 224 : 8 I. A. 210 : 4 Sar. 294 (P.C.), Bibi Sahodrai v. Rai Jung Bahadur.

23. ('15) 2 A.I.R. 1915 Bom. 92 : 28 I. C. 24 : 39 Bom. 335 : 17 Bom. L. R. 141, Subappa v. Venkappa.

24. ('25) 12 A.I.R. 1925 All. 454 : 85 I. C. 578 : 47 All. 389 : 23 A. L. J. 244, Ali Hammad v. Ghurpattar.

25. ('27) 14 A. I. R. 1927 All. 799 : 102 I. C. 814 : 50 All. 89 : 25 A. L. J. 802, Ram Surat v. Badri Narain Singh.

26. ('34) 21 A.I.R. 1934 Oudh 21 : 147 I. C. 805 : 11 O. W. N. 104, Mahmed Mahmud v. Mahmed Afaq.

27. ('23) 10 A. I. R. 1923 Cal. 1 : 74 I. C. 630 : 50 Cal. 49 : 36 C. L. J. 35, Charu Chandra v. Nahush Chandra.

28. ('05) 9 C.W.N. 1061, Protap Chandra v. Durga Charan.

p. 1064; 33 Cal. 821²⁹ at p. 828. A title which has been extinguished becomes perfect by forcibly taking possession even for a moment, which is certainly a strange result of the interpretation put upon Art. 142 in 57 ALL. 278.² This is another reason why in my opinion the view taken in 51 ALL. 104²¹ is correct and should be adopted.

The interpretation put upon Art. 142 in 57 ALL. 278² would lead to peculiar difficulties for if that interpretation is correct a suit may fall both under Art. 142 and under Art. 136. For convenience the two articles are reproduced below :

Description of suits.	Period of limitation.	Time from which period begins to run.
136. By a purchaser at a private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale.	12 years.	When the vendor is first entitled to possession.
142. For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	12 years.	The date of the dispossession or discontinuance.

Let us take the following concrete case : P who is in possession of immovable property is dispossessed in 1900. He sells the property to Q in 1905. Q sells the property to R in 1908. R files a suit against defendant D in 1916 more than 12 years after P's dispossession in 1900 but less than 12 years from 1905 when R's vendor Q was entitled to possession. The suit falls under Art. 142 as R, the plaintiff, derives his right to sue from P who was dispossessed in 1900, and the word plaintiff in Art. 142 includes any person from or through whom a plaintiff derives his right to sue. A purchaser derives his right to sue from his vendor or vendor's vendor and also the liability to be sued if any in suits filed against him. The words 'plaintiff' and 'defendant' have been defined in S. 2, Limitation Act, to include other persons, but there is no such definition of the word 'vendor'. The term 'vendor' therefore does not include vendor's vendor.

It is thus seen that Art. 142, Limitation Act, applies to the hypothetical case stated above. And that case would also fall obviously under Art. 136, Limitation Act, and the

commencement of limitation would be different. If Art. 142 is applied, limitation would start from 1900, whereas if Art. 136 is applied, limitation would run from 1905. This anomaly is the result of the interpretation put on Art. 142 in 57 ALL. 278² and would not follow if the view suggested by me is accepted, namely, that Art. 142 applies to suits based on 'possessory title' only and not based on title.

The word 'defendant' has been defined in S. 2 (4), Limitation Act, thus : " 'Defendant' includes any person from or through whom a defendant derives his liability to be sued." And this has been held to apply to a purchaser : *vide* 16 Bom. 197.³⁰ Sargent C. J., observed as follows :

"The purchaser at an auction sale acquires the right, title and interest of the judgment-debtor, and in virtue of that is put into possession, by reason of which he becomes liable to be sued by the true owner. He, therefore, we think, derives such liability within the contemplation of S. 3 from or through the judgment-debtor. No doubt, in *Dinendronath Sannyal v. Ramcoomar Ghose*,³¹ the Privy Council remark that the purchaser at auction sale 'derives title by operation of law adversely to the judgment-debtor'; but although the title is derived from the judgment-debtor against his will, the purchaser's liability to be ejected nonetheless arises from the title which he has derived from the judgment-debtor."

Following the same line of reasoning, a plaintiff would include plaintiff's vendor if defendant could have been sued by the plaintiff's vendor.

If it is held that in cases such as the above Art. 136 applies, then every case to which Art. 142 applies can be converted to a case falling under Art. 136 by effecting sales and the difficulty of limitation can be avoided completely. Even when the defendant has been in adverse possession for over 12 years, his title can be defeated by effecting two sales in succession and thereby inviting the application of Art. 136. Even assuming that 'vendor' includes vendor's vendor as decided in 24 I. C. 216,³² both the Arts. 136 and 142 would apply if the view taken in 57 ALL. 278² is correct. But the interpretation put on any article of limitation should be such that no two articles would apply to any one suit even if the results be the same. If the view taken in 57 ALL. 278² is correct, every suit to which Art. 136 applies would also fall under Art. 142 and Art. 136 would be superfluous. Either Art. 136 is superfluous or inconsistent with

30. ('92) 16 Bom. 197, *Ali Saheb v. Kaji Ahmed*.

31. ('81) 7 Cal. 107 : 8 I. A. 65 : 10 C. L. R. 281 : 4 Sar. 213 (P. C.).

32. ('14) 1 A. I. R. 1914 Cal. 733 : 24 I. C. 216, *Abbas v. Masabdi*.

29. ('06) 33 Cal. 821 : 10 C. W. N. 1081, *Jonab v. Suryakanta*.

Art. 142. It is an accepted rule of interpretation of statutes that no construction should be adopted which renders one part superfluous.

Suits under either of Art. 142 or Art. 144 can be classified into three categories : (a) where the plaintiff can prove that he had possession within 12 years prior to the suit; (b) where the defendant can prove adverse possession for 12 years; (c) where neither can be proved. In suits falling under the first two categories, it matters little whether Art. 142 is applied or Art. 144. The alternatives (a) and (b) are mutually exclusive. If plaintiff can prove his possession within 12 years prior to the suit, it will not be possible for defendant to prove adverse possession for 12 years. And if defendant can prove adverse possession for 12 years, plaintiff cannot prove his possession within 12 years prior to the suit.

It is suits falling in the third category that really test the soundness of the view taken in 57 ALL. 278.² This category can be sub-divided two-fold as follows : (c) (i) Where plaintiff does not allege prior possession and dispossession or discontinuance of possession but only relies on his title; (c) (ii) where plaintiff does allege prior possession and dispossession or discontinuance of possession in addition to relying on title.

In case of the former sub-category, according to any view it is Art. 144 that is applicable. In the case of the latter sub-category according to the view taken in 57 ALL. 278² Art. 142 is applicable. But this leads to inequitable anomalies because although plaintiff proves his title and although defendant cannot prove adverse possession for 12 years, the former's suit fails notwithstanding that defendant may have been in possession only for a few days or months.

One more anomaly which results from the interpretation put upon Art. 142 in 57 ALL. 278² may be mentioned by giving a concrete case : P discontinues his possession of immovable property on 1st January 1900, whereupon Q takes possession for two months and discontinues possession on 1st March 1900 followed by R in possession for 11 years and 11 months, i. e., up to 1st February 1912. On 1st February 1912, P's title is extinguished. R's adverse possession is only for the period of 11 years and 11 months. If P and Q file suits against R for possession, P would fail whereas Q who had possession only for two months would succeed. It may be argued, that is but a result of the rule of possessory title, but the question may be asked why as between P, R and Q, P should not be preferred so long as there is no one with 12 years' adverse posses-

sion. Actually on 1st February 1912, there is no one with a clear title : There is a void in the title of the land. But surely there must be some one in whom the title vests.

One more anomaly needs to be noticed. A, the owner of a land in possession in 1900, is dispossessed by B, and files a suit against B in 1920 for possession, and proves his (A's) title and possession in 1900. C who became the owner of a land in 1900 and never acquired possession files a suit in 1920 against trespasser D for possession. C proves his title. In illust. 1 A has proved both his title and possession in 1900. But Art. 142 places a further burden of proving that he did not discontinue possession for more than twelve years or was not dispossessed more than twelve years before the suit. In illust. 2 when C has proved his title he has nothing to prove further. The burden of proof is on D, the trespasser. Why should the law favour C who, having become the owner of land in 1900, failed to sue for possession for twenty years and disfavour A who neglected to recover possession for twenty years, but is unable to prove possession within twelve years of suit? This question has nothing to do with the point why the period of limitation should be twelve years and not 11 years or 13 years. Why should A suffer because he took care to obtain possession of the land he was entitled to? It is true that he allowed himself to be dispossessed and neglected his rights. But there is no reason for distinguishing neglect to take possession of what you are entitled to from neglect to recover what you have lost. At any rate no harm would be done by abolishing this distinction. The law should not put a premium on persons who neglect to acquire possession of the land which they are entitled to and a plaintiff who proves title and also prior possession should, it stands to reason, stand in a better position than one who merely proves title.

The view taken in 57 ALL. 278² leads to many anomalies as shown in this article. The only rational view which does not lead to any anomaly is to hold that Art. 142 applies only to suits where plaintiff has no title except the one based on mere previous possession.

It may be argued that the wording of the articles has to be interpreted according to the plain meaning uninfluenced by possible anomalous results following the correct interpretation. I submit with great respect that on a proper interpretation of the wording of the two articles the view taken in 51 ALL. 1042¹ is sounder than that taken in 57 ALL. 278.²

The use of the words 'or discontinuance' would negative the correctness of the view taken in 57 ALL. 278.² For, in the case of a person with title, he is presumed to be in constructive possession of the land even when he discontinues physical possession so long as none else has dispossessed him. If Art. 142 is to be applied to suits based on title as well then the word 'discontinuance' will have to be given an artificial meaning or the word itself will be superfluous, because the person with title continues to be in constructive possession until he is actually dispossessed by some one else. If the person with title discontinues possession in the ordinary sense and is followed in possession by some one else that would be dispossession of the constructive possession of the owner. But if Art. 142 is to be applied only to suits on possessory title the word 'discontinuance' in Art. 142 can be given its natural meaning.

The authors of the Limitation Act have unnecessarily provided several articles for limitation in the case of suits for possession which has led to conflicts of opinion and to anomalies. The best course would be to simplify the articles by omitting altogether Arts. 136-141 and simply providing for two cases (a) where the plaintiff relies on title, (b) where the plaintiff cannot rely on title but only on possessory title. In the former the plaintiff should succeed unless the defendant can show defendant's title by 12 years' adverse possession and in the latter plaintiff should succeed if he can show that his possession is prior to that of the defendant and also within 12 years of the suit. Under such a simplified rule Art. 144 would apply to all suits to which at present Arts. 136-141 apply and the result would be exactly the same as the period of commencement of limitation provided in Arts. 136-141 is exactly the period of commencement of adverse possession.

EXTRA TERRITORIAL CIVIL JURISDICTION

by SARDAR RANBIRSINGH, BA., LL.B., *Chief Justice, Dholpur State.*

The general rule of Private International Law with regard to jurisdiction over foreigners is "*Extra territorium jus dicenti non paratur legis extra territorium non obligant.*" An authority, who legislates or administers justice beyond his own realm may be safely disobeyed beyond his jurisdiction. And the presumption is that the Legislature does not intend to exceed its jurisdiction. Another general rule to be remembered is that all legislation is territorial and is consequently applicable only to such foreigners as come into the country or have made themselves subject to the jurisdiction of the Court of that country. A very important judgment of the Privy Council on this point is in 21 I. A. 171.¹ In this case the Raja of Faridkot obtained a decree in a Court in Faridkot State against the defendant, on account of the defendant having incurred certain liabilities in relation to his duties as the treasurer of Faridkot State. He was not a resident of the State and did not submit to its jurisdiction. On the basis of that decree a suit was instituted against the defendant in the Punjab Courts. Their Lordships of the Privy Council held that a decree obtained against the defendant under these circumstances and passed by the State Courts was a mere nullity. In the course of their judg-

ment, the following important observations were made :

"Faridkot is a Native State, the Raja of which has been recognized by Her Majesty as having an independent civil, criminal, and fiscal jurisdiction. The judgments of its Courts are and ought to be regarded in Her Majesty's Courts of British India as foreign judgments. The Additional Commissioner of Lahore thought that no action could be brought in Her Majesty's Courts upon a judgment of a Native State, but in this opinion their Lordships do not concur. . . . Under these circumstances, there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit, "*actor sequitur forum rei*" which is rightly stated by Sir Robert Phillimore (International Law 238, Vol. 4, S. 891) to "lie at the root of all international and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and "*extra territorium jus dicenti impune non paretur.*" Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled or who when living were domiciled within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the power which so legislates. In a personal action, to which none of these causes of jurisdiction apply, a decree

1. ('94) 22 Cal. 222 : 21 I. A. 171 : 112 P. R. 1894: 6 Sar. 503 (P.C.), Gur Dayal Singh v. Raja of Faridkot.

pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced. These are doctrines laid down by all the leading authorities on International Law, among others, by Story (Conflict of Laws, Edn. 2, Ss. 546, 549, 553, 554, 556, 586) and by Chancellor Kent (Commentaries, Vol. 1, p. 284 Note (c), Edn. 10) and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power and they ought to be resorted to, to do justice."

In A.I.R. 1927 Sind 160² it has also been held that:

"It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court, (Dicey on Conflict of Laws, edn. 3 page 40)." An effective judgment has been defined to mean a decree, which the Sovereign under whose authority it is delivered has in fact the power to enforce against the person bound by it (Dicey page 42).

But, in recent judgments, it has been held that where the cause of action against a non-resident foreigner arises within the jurisdiction of a Court, it is a sufficient ground to confer jurisdiction on that Court. A very interesting and important judgment on this point is in A. I. R. 1934 ALL. 740.³ Although this judgment of the Allahabad High Court has been reversed by their Lordships of the Privy Council in 1938, but unfortunately no decision has been given in the judgment of the Privy Council as to whether s. 20, Civil P. C., gives the power to British Indian Courts to entertain cases against foreigners when the cause of action arises within the local limits of the British Indian Courts. The Allahabad High Court held that under s. 20, Civil P. C., the British Indian Courts can entertain suits against absent foreigners when the cause of action arises within their jurisdiction, regardless of the rule of the international comity and in doing so relied upon the judgments of the Bombay High Court, 17 Bom. 662⁴ and 25 Bom. 528,⁵ where it was

definitely held that under the Civil Procedure Code, British Courts are empowered to pass judgments against a non-resident foreigner provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment. The Madras High Court has also taken the same view in 29 Mad. 239.⁶ White C. J. has observed in that judgment:

"It seems to me that to give jurisdiction over an absent foreigner where the cause of action against him arises within the local limits of the jurisdiction of the Court, is the legitimate exercise of Sovereign right . . . Sir V. Bhashyam Ayyangar's proposition was that it was contrary to the principles of the International Law for a Court to exercise jurisdiction over an absent foreigner solely upon the ground that the cause of action had arisen within the local limits of the jurisdiction of the Court. I do not think that more recent authorities support this proposition."

In 20 Bom. 133,⁷ it was held that the wordings of a passage in the Faridkot judgment amply provide for the jurisdiction of the Court, when we have local legislation to that effect. The passage of the Faridkot judgment referred to says:

"A decree pronounced *in absentem* by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by International Law an absolute nullity. He is under no obligation of any kind to obey it and must be regarded as a mere nullity by the Court of every nation except (when authorized by special legislation) in the country of the forum by which it was pronounced."

An observation of their Lordships of the Privy Council in 26 Mad. 544⁸ also supports the view taken by the Bombay and Madras High Courts. They observed as follows:

"Their Lordships see no reason for doubting the correctness of the decision in 17 Bom. 662⁴ where the defendant was a native of Cutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought."

Now it will be seen, that according to this view a suit against a non-resident foreigner would be maintainable in the British Court if the cause of action against him has arisen within the local limits of the British Courts. This later pronouncement of their Lordships of the Privy Council has been interpreted by the High Courts in India to mean that the view taken in the Faridkot case¹ is not applicable to those cases in which the cause of action has arisen within the local limits of the British Indian Courts. In A. I. R. 1934 ALL. 740,³ Niamatullah J. has remarked that the position and constitution of Indian States are so peculiar that abstract principles of

2. ('27) 14 A.I.R. 1927 Sind 160 : 101 I. C. 438 : 23 S.L.R. 46, Doongersi Avchar v. Haribhoy Pragji.

3. ('34) 21 A. I. R. 1934 All. 740: 153 I. C. 824: 56 All. 828: 1934 A. L. J. 1093, Baroda State Railways v. Sheikh Habib Ullah.

4. ('93) 17 Bom. 662, Girdhar v. Kassigor.

5. ('01) 25 Bom. 528: 3 Bom. L. R. 82, Rambhat v. Shanker Baswant.

6. ('06) 29 Mad. 239: 16 M. L. J. 238, Srinivasa Moorthy v. Venkata Varada Aiyangar.

7. ('96) 20 Bom. 133, Ram Ravji v. Prahalad Dass.

8. ('03) 26 Mad. 544: 30 I.A. 220: 8 Sar. 523 (P.C.), Annamalai Chetty v. Murugesu Chetty.

International Law, when applied to concrete cases arising in British India will lead to anomalous results. He further observes that: "At first sight there seems an inconsistency between a dictum of their Lordships of the Privy Council in the *Faridkot case*¹ and their reference with approval to 17 Bom. 662⁴ already quoted. It seems to me that the two are easily reconcilable. In the *Faridkot case*¹ the question was whether the Court of one Indian State had jurisdiction over a person residing in another Indian State. Their Lordships held in the negative, even if the cause of action had accrued within the jurisdiction of the Faridkot Court, the reason being that one of these States had no authority to confer jurisdiction upon its Court as to affect residents of another State, assuming the law in force in Faridkot conferred jurisdiction upon its Courts against foreigners in the manner laid down by S. 20, Civil P. C. In 17 Bom. 662⁴ the question was whether a Court in British India had jurisdiction against a resident of Cutch, where the cause of action arose within its jurisdiction. The answer in the affirmative, given both by the Bombay High Court and their Lordships of the Privy Council is easily supported on the hypothesis which I have discussed above, namely, that the Indian Legislature has enacted S. 20, Civil P. C. so as to confer jurisdiction on the British Indian Courts as regards persons residing in Indian States, who owe allegiance to the Crown, from whom the Indian Legislature derives its authority."

I am afraid there is no justification to interpret the later judgment of the Privy Council in the way suggested above. If the arising of the cause of action is held to be sufficient for conferring jurisdiction on British Courts against foreigners, the same argument will have to be applied in the case of Indian State Courts and the Faridkot judgment will have to be looked upon as no longer good law. At the same time, we cannot ignore the fact as to how far the judgments of foreign Courts could be rendered effective in the jurisdiction in which it is sought to be executed. In 25 Bom. 528⁵ the learned Judges of the Bombay High Court held that under the Civil Procedure Code British Courts are empowered to pass judgments against a non-resident foreigner provided the cause of action has arisen within the jurisdiction of the Court pronouncing judgment. But it was contended in that case that the points for the determination were whether the Court was judicially competent to entertain the action and that how far its judgment would be effective. It was held that the competence of the Court was to be determined with reference to the provisions of S. 20, Civil P. C., and the effectiveness of the judgment by reference to the rules of the International Law. It was also remarked in A. I. R. 1919 Mad. 883,⁹ that :

"A municipal Court is entitled to exercise its jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question

whether its decree can be enforced against him in the foreign State is a question for the disposal of that State."

In this connexion Rachhpal Singh J. has also opined in the aforesaid Allahabad case³ that :

"It is clear to me that if the British Court has the power to pass a judgment having regard to the provision of the Civil Procedure Code then the other question as to whether or not it would be effective everywhere need not be considered."

I will deal with the question of execution of decrees from British Indian Courts in Indian States elsewhere, suffice it to say here, that the British Indian Legislatures have no power to enforce the execution of their decrees in Indian States and the policy of the Indian Legislature has been to leave such decrees to be executed in the Courts of Indian States pursuant to the legislative authority of such State, whenever the Indian States agree to do so on basis of reciprocity.

Now I come to the arguments employed in the aforesaid important judgment of the Allahabad High Court, A. I. R. 1934 ALL. 740,³ for holding that under S. 20, Civil P. C., the British Indian Courts had jurisdiction over absent foreigners as also for holding that the principles of International Law could not be applied to Indian States. Niamatuallah J. has observed :

"The jurisdiction of the Subordinate Judge of Agra is in substance questioned on the ground that the Indian Legislature had no power to confer jurisdiction upon Courts in British India to entertain suits against residents in Indian States, where cause of action arose within their jurisdiction. I do not think that this ground can prevail as it cannot be said that a resident of an Indian State owes no allegiance or obedience to the former which legislates The power to legislate possessed by the Indian Legislature is derived from Act of Parliament to which undoubtedly every Indian State and its subjects owe allegiance and obedience."

His Lordship then referred to the Indian Council Act of 1861 and also to the amending Act of 1865 to show that the British Parliament could legislate "for all British subjects or Her Majesty within the Dominions of Princes and States." His Lordship further goes on to observe that :

"The power thus conferred upon the Governor-General is very wide and comprehensive and it cannot be doubted that any law passed by the legislative authority in British India which has received the assent of the Governor-General must be recognised as binding on those residing in Indian States so far as such law effects them . . . A decree passed against a person residing in an Indian State by a Court having jurisdiction under S. 20, Civil P. C., cannot be disregarded as one passed without jurisdiction by any Court in India or one situate in an Indian State; all of which owe allegiance to the Crown, from whom legislative authority is derived by the Indian Legislature which conferred jurisdiction upon the Court passing it."

As a matter of general rule, residence, per-

9. (19) 6 A. I. R. 1919 Mad. 883 : 47 I. C. 708, Raja Bhai Narain v. Karim Mohd.

manent or temporary, within the territorial jurisdiction of the Court is necessary to make a defendant who is a foreigner, subject to its jurisdiction. The reason of this rule is stated by Story in his Conflict of Laws that :

"No Sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its juridical decisions."

Thus the cause of action alone is not a ground of jurisdiction recognised by International Law. It is, however, held to be otherwise where the non-resident foreigner is a subject of the Sovereign power which legislates : see Chitaley's C. P. Code, 2nd Edn., Vol. 1, p. 232. It has been held in 28 Cal. 641,¹⁰ that this principle could not apply when the foreigner is a native of British India and the Court which passed the judgment was the Queen's Bench Division of the High Court of Justice in England. Their Lordships have observed :

"Now, can it be said that the same reason holds good when the foreigner is a native of British India and the Court which passed the judgment in question was the Queen's Bench Division of the High Court of Justice in England. Though the defendants here are foreigners, they owe allegiance to the common Sovereign of England and British India and are subject to the Supreme legislative authority in the British Empire. It is true that India has a separate Legislature and an Act of Parliament does not apply to India unless India is expressly included in its operation; but that is based upon conveniences of legislation and not upon any want of authority in the Parliament to legislate for India. If therefore the Supreme Legislature in the British Empire authorises an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner, by reason of the cause of action arising within its jurisdiction, and the foreigner is a native of British India, he cannot treat the judgment passed as a nullity merely because he did not reside within the jurisdiction of the Court which passed it."

Thus the fact that the defendant is a subject of the British Sovereign owing allegiance or obedience to him has been recognised as a ground of jurisdiction by International Law. But it must be clearly understood that in the absence of powers conferred by the Sovereign Legislature, the Legislature of one country cannot confer jurisdiction over non-resident foreigners of another country even though both the countries owe allegiance to the same sovereign power.

In 3 I. C. 190¹¹ it has been held that though Ceylon and British India owed allegiance to the same sovereign, the enforceability of the judgments of the Courts of either country on those of the other was guided by the rule of private International Law, viz., that the judgment of a foreign Court passed against the

defendant *in absentem* cannot be enforced against him in a Court in British India. It has also been held in this judgment of the Madras High Court that a decree based on a contract imposing personal obligation upon an absent foreigner is not countenanced by the comity of nations only because the defendant entered into the contract in the territory of the forum which passed the decree. Similarly, the Legislature of the Native State of Pudukottah has been held to be unable to confer powers on the Courts at Pudukottah to try cases against persons residing in British India on the ground that the cause of action arose in Pudukottah. The decree passed in such cases by the Court at Pudukottah was not enforced in British India under S. 13, Civil P. C., 1 Mad. 196.¹² In another case 20 Mad. 112,¹³ the defendant was domiciled in and was a resident of British India and had not appeared to defend the suit at Kandy in Ceylon, although he was a partner in a firm which carried on business at Kandy. It was held that the Court at Kandy had no jurisdiction over the defendant although the cause of action arose within the jurisdiction of the Kandy Court.

If the British Indian Courts persistently hold that S. 20, Civil P. C., gives jurisdiction to British Indian Courts to pass a decree against residents of a foreign State if the cause of action against them arose within the territorial jurisdiction of such Courts, such a decree cannot have any effect against State subject within the territorial limits of that State and should be considered for all purposes an absolute nullity and is not enforceable against the defendant within the State simply on the ground that the decree has been passed by a Court in British India, which derives its authority from the Crown, to which Indian States owe allegiance.

Rachhpal Singh J. of the Allahabad High Court has also observed in the above mentioned Baroda State Railway case³ that the rule of International Law which is based on the principle of "absolute independence of the Sovereign of recognised superior authority," cannot be applied to the Princes in India for the simple reason that they are subordinate to the authority of the British Crown. He has observed :

"A Ruling Prince can be sued in a British Court. He can be arrested and his property can be attached provided that the sanction of the Governor-General is obtained. The Government of India has power to

10. ('01) 28 Cal. 641 : 5 C. W. N. 741, Moazzim Hussain Khan v. Raphael Robinson.

11. ('09) 32 Mad. 469; 3 I. C. 190; 19 M. L. J. 457, Sheikh Atham Sahib v. Daoud Sahib.

12. ('76-78) 1 Mad. 196, Mathappa Chetti v. Chellappa Chetti.

13. ('97) 20 Mad. 112; 7 M. L. J. 76, Nallakaruppa Settiar v. Md. Iburaam Sahib.

hold an inquiry into his conduct. The Government has power to depose him The British Crown is the Paramount Authority in India. The Ruling Princes owe allegiance to the British Crown as Sovereign power. And it would certainly be a misnomer to style Indian States as "Nations". They are dependent States. I do not think that the rules of private International Law can be made applicable to such States." Niamatullah J. has remarked in the same judgment that it is not necessary to consider the question whether a person residing in an Indian State should be considered a foreigner or a British subject as in either case the Governor-General of India in Council is authorized to make laws applicable to them. In 25 Bom. 528⁵ it has also been remarked :

"It may well be doubted whether it would be correct in such case as this to say that the assertion of jurisdiction by the British Legislature is inconsistent with comity of nations or with the established rules of private International Law" (such as would be applicable between England and say, France or Germany.)

Apart from an academic discussion about the constitutional position of the Indian States in the International World, it has been well established that, for purposes of the British Indian legislation, the territories of Indian States are foreign territories. Sir C. Ilbert has observed in his treatise on Government of India, page 420, Edn. 3, that the territory of an Indian Prince is for the purposes of municipal law not a British territory and their subjects are not British subjects. The laws of England do not apply to the State subjects. The King in Parliament is precluded from legislating for the Indian States. The Secretary of State for India's letter dated 28th September 1927 to the Secretary General of the League of Nations relating to the ratifications of conventions of the International Labour Organization by Indian States, makes this abundantly clear.

"The exact relations between the various States and the paramount power are determined by a series of engagements and by long established political practice. These relations are by no means identical, but, broadly speaking, they have this in common, that those branches of internal administration which might be affected by decisions reached at International Labour Conferences are the concern of the Rulers of the States and are not controlled by the paramount power. The Legislature of British India, moreover cannot legislate for the States nor can any matter relating to the affair of a State form the subject of a question of motion in the Indian Legislature."

It has also been held in 8 Cal. 985¹⁴ that the territory of Indian States is not British territory. The certificate which the India Office gave to assist the Court in assessing the status of the Gaekwar of Baroda as a foreign Ruling Prince further illumines the position.

"The Gaekwar of Baroda has been recognized by the Government of India as a Ruling Chief governing his own territories under the suzerainty of His Majesty. He is treated as falling within the class referred to in the Interpretation Act, 1889, S. 18, sub-s. (5), as that of Native Princes or Chiefs under the suzerainty of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat His Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty. But, though His Highness is thus not independent, he exercises as ruler of his State, various attributes of sovereignty, including internal sovereignty which is not derived from British law, but is inherent in the Ruling Chief of Baroda, subject however to the suzerainty of His Majesty, the King of England" (L. R. 1912 P. 92.¹⁵)

(To be continued.)

14. ('82) 8 Cal. 985 : 11 C.L.R. 241 (F.B.), *Empress v. Keshub Mahajan*.

15. (1912) L. R. 1912 P. 92 : 81 L. J. P. 33 : 105 L. T. 991 : 28 T. L. R. 180, *Statham v. Statham*, etc.

REVIEW

The Right Hon'ble Sir Shadi Lal, by K. L. GAUBA, *Advocate, Shahchirag Chambers, Lahore*. Published by H. R. Bir for the Law Book Depot, Book-sellers and Publishers, Krishna Nagar, Lahore. Pages 169. Price Rs. 5.

This book contains a biographical sketch of the Rt. Hon'ble Sir Shadi Lal, Chief Justice of the High Court of Judicature at Lahore

(1920-1934) and then a Privy Councillor. The author has endeavoured throughout to set out in simple and unostentatious language the principal facts in the life of Sir Shadi Lal. Though much more could have been said about Sir Shadi Lal, the author has tried to paint a general picture of what kind of man the learned Chief Justice was and to elucidate briefly the main occasions on which Sir Shadi Lal appeared as artificer of the law.

EXTRA TERRITORIAL CIVIL JURISDICTION

by SARDAR RANBIRSINGH, B.A., LL.B., *Chief Justice, Dholpur State.*

(continued from page 44)

The Indian Councils Act referred to in the aforesaid judgment applies only to foreigners and British subjects and cannot be held to apply to a person residing in an Indian State as an Indian State subject. The Governor-General is not authorised to make laws to apply to Indian State subjects residing in Indian States. In fact S. 65, Government of India Act, 1919, which defines the powers of the Indian Legislature, shows that it has no power to make any laws affecting the subjects of the Indian States. The provision in the Indian Councils Act of 1861 regarding foreigners and British Indian subjects was found necessary in view of the international obligations of the Paramount Power. The limitation of the Sovereignty of Indian States in respect to their foreign relations removed all possibilities of affording protection by the Indian States to their own subjects staying in foreign countries. The natural result was that the authority which guided the foreign policy of the States, also guarded their subjects abroad, and in 1876 the Parliament declared that

"the subjects of such Princes and States are, when residing or being in places hereinafter referred to, entitled to the protection of the British and receive such protection equally with the subjects of Her Majesty."

While claiming to give protection to State subjects in foreign countries the British Government also claimed to protect the lives and property of foreigners staying or residing in the States and secure them the enjoyment of just rights and privileges. But it should be realized that the British Government while fulfilling this function, is only undertaking an inter-statal obligation, more or less analogous to the League of Nations. The formal authority under which these powers of jurisdiction were exercised was originally the Royal prerogative which was in due course codified under the Indian Foreign Jurisdiction Order-in-Council, 1902. The draft of the Instrument of Accession received from the Government of India by the Rulers of Indian States for execution by them, if the Rulers agree to enter the Federation as contemplated under the Government of India Act, 1935, contains a clear clause to show that the Parliament does not exercise any legislative authority within the States. The clause runs as follows:

"And whereas the said Act cannot apply to any of my territories save by virtue of my consent and concurrence signified by my accession to the federation."

Section 101, Government of India Act, 1935, also expressly provides that nothing in the Act should be construed as empowering the Federal Legislature to make laws for a State otherwise than in accordance with its Instru-

ment of Accession and any limitation contained therein.

The amended definition of "Indian States" in S. 311, Government of India Act, 1935, is also significant, and it runs as follows:

"'Indian States' means any territory, not being part of British India, which His Majesty recognises as being such a State, whether described as a State, an estate, a Jagir or otherwise."

In the General Clauses Act the word "India" is defined as "British India" together with any territories of any Indian Prince or Chief under the suzerainty of Her Majesty. The word "suzerainty" is defined in L. R. (1912) P. 92¹⁵ and A. I. R. 1934 ALL. 740³ as a term applying to certain international relations between two sovereign States whereby one whilst retaining a more or less limited sovereignty acknowledges the supremacy of the other. Thus suzerainty of the British Crown does not affect in any way the integrity or the internal sovereignty enjoyed by a ruling Prince within his own territory. The allegiance by the Rulers of Indian States to the British Crown might affect or limit their sovereignty in their foreign affairs but it has nowhere been taken to justify any interference with their internal sovereignty and autonomy. Many and various as may have been the forms of intervention by the British Government in the affairs of Indian States and large as may have been the political control exercised over them, no assertion has ever been made of exercising territorial sovereignty over the Indian States and no legislative power has ever been claimed within the States. Rather the position of the Rulers has always been respected and many of the functions commonly regarded as attributes of sovereignty have been preserved to them: see 33 Cal. 219.¹⁶

In a Full Bench case of the Calcutta High Court, 8 Cal. 985,¹⁴ Garth J. has observed:

"We find that the Indian Government and the Maharaja have for a long series of years concurred in considering and treating this territory as no part of British India and when we also find that Acts of the Indian Legislature, which have been passed for and have been acted upon throughout British India, have never been acted upon or considered to be law in this territory, I must say it seems to me that such evidence, in the absence of any cogent proof to the contrary, ought in British Indian Courts, to be almost conclusive upon the point. (Whether the territory of Mohour Bhanj forms part of British India or not.)"

He further remarked that in his opinion the acts of interference by the British authority, which may have been intended rather as friendly aids to the Maharaja in the management of his dominions, than as evidencing any wish on the part of the Indian Govern-

16. (1906) 33 Cal. 219 : 33 I. A. 1 : 3 C. L. J. 395 : 10 C. W. N. 361 (P.C.), Hem Chand Deochand v. Azam Sakarlal Chhotam Lal.

ment to take the rule of the territory out of the Maharaja's hands. In another case, 16 Cal. 667,¹⁷ it was held that British Indian Law had no application to the Tributary Mahal of Kheonjur which is on precisely the same footing in that respect as Mohur Bunj.

In A. I. R. 1918 Bom. 236,¹⁸ it has been held by the Bombay High Court that

"we have no power to legislate for Native States and feeling is so sensitive on these points that it is easily intelligible that our Legislature would have refrained

17. ('89) 16 Cal. 667, Bichitranand Das v. Bhugbut Perai.

18. ('18) 5 A.I.R. 1918 Bom. 236 : 46 I. C. 56 : 42 Bom. 420 : 20 Bom. L. R. 421, Janardhan Govind v. Narayan Krishnaji.

from inserting any provision in our statute which might have had the appearance of asserting a right over the Courts of a Native State."

Thus, it is clear that the mere fact that the Indian States owe political allegiance to the British Crown is not sufficient ground for not observing the general principles of international law with regard to the exercise of jurisdiction over subjects of Indian States who are not residents of British India and the British Crown or its Agents have no power to make laws in respect of the territories comprised in Indian States. The Legislature of British India cannot legislate for the States nor can any matter relating to the affairs of a State form the subject of a question or motion in the Indian Legislature.

REVIEWS

Kulkarni's Digest, 1931-1944 (in 6 Volumes) — Volume 1, by V. M. KULKARNI, B.A., LL.B., *Advocate, Editor, Indian Cases and Criminal Law Journal of India, Lahore*. The copies can be had from the Kulkarni's Publications, Limited, A 160-161, Lahore. Pre-publication Price Rs. 66.

A consolidated digest from 1930 up-to-date was badly needed by the legal profession. Mr. Kulkarni has removed that want by publishing this digest of all cases decided between 1931-1944. Statutory headings have been observed and copious cross-references have been given to guide the lawyer to find out the proper place for particular case-law. When the cases falling under one heading are numerous they have been further divided under proper headings and sub-headings so that the work of the lawyer may be facilitated while searching for a case on a particular point. The long notes are given in full and hence a lawyer can find from the digest itself whether a particular case is useful to him or not. The

printing and get-up are attractive. The price, considering the abnormal rise in the prices, is moderate.

The Law of Property (English and Indian), by G. C. VENKATA SUBBARAO, B.Sc., M.L., *Gold Medalist, Advocate, High Court, Madras*. The Book can be had from the Madras Law Journal Office, Mylapore, Madras. Price Rs. 12. Pages over 600.

This is one of the very few books we have on this important branch of law. In the introduction the author has explained the origin, growth and the cardinal principles round which the law of property has been built up. The subject dealt with in this book is based mainly on the comparative and historical study of the English Law of Real Property and the Indian Law of Immovable Property. The principles have been clearly exposed and case-law both the English and Indian has been copiously given. The printing and get-up are nice.

END

THE
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1944

[Vol. 31]

IMPERIAL ACTS SECTION

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THE ALL INDIA REPORTER 1944

IMPERIAL ACTS SECTION

ACT NO. XXV OF 1943.

The Victoria Memorial (Amendment) Act, 1943.

[Recd. G.-G.'s assent on 27th November 1943.]

An Act further to amend the Victoria Memorial Act, 1903.

WHEREAS it is expedient further to amend the Victoria Memorial Act, 1903 (X of 1903), for the purposes hereinafter appearing;

It is hereby enacted as follows:—

1. This Act may be called the Victoria Memorial (Amendment) Act, 1943.

2. For sub-section (3) of section 2 of the *Amendment of Victoria Memorial Act, section 2, Act X of 1903 (X of 1903)* (hereinafter referred to as the said Act), the following sub-section shall be substituted and shall be deemed always to have been substituted, namely:—

“(3) All acts done by a majority of those present and voting at a meeting of the Trustees, and all acts done in pursuance of a majority decision of the Trustees obtained by

circulation to the Trustees of the matter requiring decision, shall be deemed to be acts of the Trustees.”

3. After clause (b) of sub-section (2) of *Amendment of section 5, Act X of 1903* of the said Act, the following clause shall be inserted, namely:—

“(bb) for the manner in which a majority decision of the Trustees shall be obtained by circulation to the Trustees of the matter requiring decision”.

Notes.—The amendments to the Victoria Memorial Act authorises in future the procedure ordinarily followed by the trustees of the Victoria Memorial of acting on decisions arrived at by circulating to the trustees a matter requiring decision and obtaining a majority decision without holding a formal meeting of the trustees. The amendments also validate action taken in this manner in the past.

ACT NO. XXVI OF 1943.

The Criminal Procedure Amendment Act, 1943.

[Recd. G.-G.'s assent on 27th November 1943.]

An Act to make certain provision for appeals in criminal cases tried by a High Court exercising original criminal jurisdiction.

WHEREAS it is expedient to make certain provision for appeals in criminal cases tried by a High Court exercising original criminal jurisdiction;

1944 Acts/1a

It is hereby enacted as follows:—

Notes.—The Letters Patent of the various High Courts prohibit appeals in criminal cases against the decisions of a High Court exercising original iurisdic-

tion but provide a restricted power of review. The Code of Criminal Procedure provides by S. 449 for appeals from decisions in cases tried before a High Court by a jury under the special provisions of Chap. 33 but contains no provision for appeals in similar trials not held under that chapter. The present amending Act provides for a right of appeal in criminal cases tried by a High Court exercising its original jurisdiction.

1. This Act may be called the Criminal Procedure Amendment Act, 1943.

2. After section 411 of the Code of Criminal Procedure, 1898 (V of 1898) (hereinafter referred to as the said Code), the following section shall be inserted, namely:—

“411A. (1) Without prejudice to the provisions of section 449 any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court—

(a) against the conviction on any ground of appeal which involves a matter of law only;

(b) with the leave of the appellate Court, or upon the certificate of the judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be a sufficient ground of appeal; and

(c) with the leave of the appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law.”

Notes.—Sub-s. (2) was inserted by the Select Committee to make provision for appeals against acquittals. It has the effect of exactly equating the right of appeal against acquittals with the right given under (b) and (c) of sub-s. (1) of appeal against a conviction.

(3) Notwithstanding anything elsewhere contained in any Act or Regulation, an appeal under this section shall be heard by a Division

Court of the High Court composed of not less than two judges, being judges other than the judge or judges by whom the original trial was held; and if the constitution of such a Division Court is impracticable, the High Court shall report the circumstances to the Provincial Government which shall take action with a view to the transfer of the appeal under section 527 to another High Court.

(4) Subject to such rules as may from time to time be made by His Majesty in Council in this behalf, and to such conditions as the High Court may establish or require, an appeal shall lie to His Majesty in Council from any order made on appeal under sub-section (1) by a Division Court of the High Court in respect of which order the High Court declares that the matter is a fit one for such appeal.”

3. In section 412 of the said Code, after the word “by” the words “a High Court,” shall be inserted.

4. In section 413 of the said Code, after the words “in which” where they occur for the first time, the words “a High Court passes a sentence of imprisonment not exceeding six months only or of fine not exceeding two hundred rupees only or in which” shall be inserted.

5. In sections 422, 423, 427 and 431 of the said Code, for the word and figures “section 417”, the words, figures, brackets and letter “section 411A, sub-section (2), or section 417” shall be substituted.

6. Section 434 of the said Code shall be omitted.

7. (1) Clauses 25, 26 and 41 of the Letters Patent for the High Courts at Bombay, at Madras and at Fort William in Bengal, clauses 18, 19 and 32 of the Letters Patent for the High Court at Allahabad, clauses 18, 19 and 31 of the Letters Patent for the High Courts at Lahore and at Nagpur, and clauses 18, 19 and 33 of the Letters Patent for the High Court at Patna shall cease to have effect.

(2) In the Oudh Courts Act, 1925 (U. P. Act IV of 1925),—

(a) to sub-section (1) of section 14, the following proviso shall be added, namely:—

“Provided that nothing in this sub-section shall apply to a Judge or a Bench of Judges exercising original criminal jurisdiction.”;

(b) section 15 shall be omitted.

(3) In the Sindh Courts Act, 1926 (Bom. Act VII of 1926),—

(a) to section 12, the following proviso shall be added, namely:—

“Provided that nothing in this section shall apply to a judge of the Chief Court exercising the jurisdiction of the Chief Court as the principal criminal Court of original jurisdiction for the sessions division of Karachi.”;

(b) section 13 shall be omitted.

8. In the First Schedule to the Indian Amendment of Limitation Act, 1908 (IX First Schedule, Act of 1908), in article 150, to the entry in the first column, the words “or by a High Court in the exercise of its original criminal jurisdiction” shall be added.

Notes. — This section was added by the Select Committee.

ACT NO. XXVII OF 1943.

The Code of Criminal Procedure (Amendment) Act, 1943.

[Recd. G.-G.'s assent on 27th November 1943.]

An Act further to amend the Code of Criminal Procedure, 1898.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898 (V of 1898), for the purposes hereinafter appearing ;

It is hereby enacted as follows:—

1. This Act may be called the Code of Criminal Procedure (Amendment) Act, 1943.

2. In section 503 of the Code of Criminal Procedure, 1898 (V of 1898) (hereinafter referred to as the said Code),—

(a) for sub-section (2), the following sub-section shall be substituted, namely:—

“(2) When the witness resides in an Indian State the commission may be issued to the officer, who is, for the time being, the Political Agent for such State, and when the witness resides in a Tribal Area, the commission may be issued to the officer exercising the powers of a District Magistrate in, or in relation to, such area.”;

(b) for sub-section (4), the following sub-section shall be substituted, namely:—

“(4) Where the commission is issued to such officer as is mentioned in sub-section (2), he may, in lieu of proceeding in the manner laid down in sub-section (3),—

(a) delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India, or

(b) where the commission is for the examination of a witness residing in an Indian State, forward it for execution to the State Court, if any, recognised by the Crown Representative by notification in the official Gazette as a Court to which commissions may be forwarded under this sub-section, within the local limits of whose jurisdiction the witness resides.”

Notes.—As early as 1918 some States represented that the procedure prescribed by S. 503 of the Code was prejudicial to their interests and privileges and suggested that provision should be made to enable commissions referred to in S. 503 to be executed by State Courts instead of by Political Officers. A bill to that effect was introduced and passed in the Council of State in 1921 but was met with opposition in the Legislative Assembly and was allowed to lapse for the time being. The existing legal position however continues to give rise to considerable inconvenience. To avoid the difficulties in the execution of commissions Political Officers sometimes forward them to a State Court for execution although not authorised by law. The substituted sub-s. (4) of S. 503 now authorises the Political Officer to forward a commission for the examination of a witness to a State Court within whose jurisdiction the witness resides if that Court has been recognised by the Crown Representative as one competent for the purposes of S. 503 to execute such commissions.

Amendment of section 505, Act V of 1898.

3. In section 505 of the said Code,—

(a) in sub-section (1).—

(i) for the words “and the Magistrate”, the following shall be substituted, namely:—

“and, except in a case to which clause (b) of sub-section (4) of section 503 applies, the Magistrate”;

(ii) after the words “such interrogatories” the following sentence shall be added, namely:—

“In a case to which clause (b) of sub-section (4) of section 503 applies, the officer to whom the commission is issued shall forward such interrogatories to the Court to which he forwards the commission for execution.”;

(b) in sub-section (2), for the word “officer” the following shall be substituted namely:—

“except in a case to which clause (b) of sub-section (4) of section 503 applies, before such officer”.

4. In sub-section (1) of section 507 of the said Code, after the words "duly executed", the following shall be inserted, namely :—

"or, in a case to which clause (b) of sub-section (4) of section 503 applies, has been again received by the officer by whom it was forwarded to the State Court".

ACT NO. XXVIII OF 1943.

The Code of Criminal Procedure (Second Amendment) Act, 1943.

[Recd. G.-G.'s assent on 27th November 1943.]

An Act further to amend the Code of Criminal Procedure, 1898.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898 (V of 1898), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Code of Criminal Procedure (Second Amendment) Act, 1943.

2. To section 198 of the Code of Criminal Procedure, 1898 (V of 1898) (hereinafter referred to as the said Code), the following further proviso shall be added, namely :—

"Provided further that where the husband aggrieved by an offence under section 494 of the said Code is serving in any of His Majesty's armed forces under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (1) of section 199B may, with the leave of the Court, make a complaint on his behalf."

3. To section 199 of the said Code, the following further proviso shall be added, namely :—

"Provided further that where such husband is serving in any of His Majesty's armed forces under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, and where for any reason no complaint has been made by a person having care of the woman as aforesaid, some other person authorized by the husband in accordance with the provisions of sub-section (1) of section 199B may, with

the leave of the Court, make a complaint on his behalf."

4. After section 199A of the said Code, the following section shall be inserted in Chapter XV, namely :—

"199B. (1) The authorisation of a husband given to another person to make a complaint on his behalf under the second proviso to section 198 or the second proviso to section 199 shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by the Officer referred to in the said provisos, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(2) Any document purporting to be such an authorisation and complying with the provisions of sub-section (1), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine, and shall be received in evidence.

Notes. — The amendments of Ss. 198 and 199, Criminal P. C., relax the provisions of S. 199 (and of S. 198 also so far as it relates to the offence of bigamy) to permit a husband, who is a member of His Majesty's armed forces serving under conditions where it is impossible for the time being to grant him leave to attend to his domestic affairs in person, to authorise some other person to make, with the leave of the Court, a complaint on his behalf after he has been acquainted with the alleged circumstances. And the new S. 199B on the one hand lays down as a measure of precaution against abuse, certain requirements as to the form of authorisation and on the other hand provides that when these requirements have been complied with, the authorisation shall be acceptable as genuine by the Courts.

The Indian Tea Control (Second Amendment) Act, 1943

[Recd. G.-G.'s assent on 27th November 1943.]

An Act further to amend the Indian Tea Control Act, 1938.

WHEREAS it is expedient further to amend the Indian Tea Control Act, 1938 (VIII of 1938), for the purposes hereinafter appearing:—
It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Tea Control (Second Amendment) Act, 1943.

2. In section 11 of the Indian Tea Control Act, 1938 (VIII of 1938) (*Amendment of section 11, Act VIII of 1938.* hereinafter referred to as the said Act), for clause (d), the following clause shall be substituted, namely:—

“(d) exported with the previous sanction of the Central Government, within the limits prescribed in this behalf, by a Red Cross Society or by any organisation for providing amenities for troops overseas”—

3. In section 17 of the said Act, in sub-section (5), after the words “the Committee may” the words “with the general or special previous sanction of the Central Government refuse to issue a special export licence or” shall be inserted.

4. In sub-section (1) of section 29 of the said Act, for the words “Where any land which was on the 31st day of March 1943 planted with tea” the following shall be substituted, namely :—

“Where any land which was at the 31st day of March, 1933, planted with tea (including land planted with tea at the 31st day of March, 1931, from which the original bushes had been uprooted and which had not been replanted with tea at the said 31st day of March 1933), or where any land planted with tea after the 31st day of March, 1933”.

Notes :— Sub-section (1) of section 29 as it now stands requires that in order to qualify for the benefits contemplated by that sub-section the land in question should have been planted with tea on the 31st March 1943 whereas the original intention of the Legislature was that the benefit should extend to all tea areas in existence on the 31st March 1933 or planted thereafter. The present amendment of that sub-section removes the defect by giving effect to the original intention.

5. In section 33 of the said Act, after the words “A breach of the provision of” the words, brackets and figures “sub-section (4) of section 12 or” shall be inserted.

ACT NO. XXX OF 1943.**The Indian Companies (Amendment) Act, 1943**

[Recd. G.-G.'s assent on 27th November 1943.]

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913 (VII of 1913), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Companies (Amendment) Act, 1943.

2. In sub-section (1) of section 132 of the Indian Companies Act, 1913 (VII of 1913) (*Amendment of section 132, Act VII of 1913.* hereinafter referred to as the said Act), after the word “company,” the following shall be inserted and shall be deemed always to have been inserted, namely :—

“in accordance with the requirements indicated by the items contained in the form marked F in the third Schedule.”

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3. In sub-section (3) of section 151 of the said Act, for the words “Any such table or form, when altered, shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act,” the following shall be substituted and shall be deemed always to have been substituted, namely :—

“Any alteration or addition made under sub-section (1) shall be published in the official Gazette, and on such publication the table or form as so altered or the added form, as the case may be, shall have effect as if enacted in this Act.”

4. In Table A in the First Schedule to the said Act, in Regulation 107, after the words “the amount of gross income”,

the brackets and words "(diminished in the case of a banking company by the amount of any provision made to the satisfaction of the auditors for bad and doubtful debts)" shall be inserted and shall be deemed always to have been inserted.

5. In the form marked F in the Third Amendment of Schedule to the said Act, Third Schedule, the following substitutions shall be made and shall be deemed always to have been made, namely :—

(a) in the column headed "CAPITAL AND LIABILITIES", for the sub-head "PROVISION FOR BAD AND DOUBTFUL DEBTS", the following sub-head shall be substituted, namely :—

"PROVISION FOR BAD AND DOUBTFUL DEBTS (IN THE CASE OF COMPANIES OTHER THAN BANKING COMPANIES)". ;

(b) in the column headed "PROPERTY AND ASSETS", for the sub-head "BOOK DEBTS", the following sub-head shall be

substituted, namely :—

"BOOK DEBTS (OTHER THAN BAD AND DOUBTFUL DEBTS OF A BANKING COMPANY FOR WHICH PROVISION HAS BEEN MADE TO THE SATISFACTION OF THE AUDITORS)".

Notes:—"Following the recognised practice of banking companies in India and the United Kingdom such companies were by a notification issued in 1927 under Section 151 of the Indian Companies Act, 1913, relieved from the obligation to disclose in form F in the third schedule to the Act those bad and doubtful debts for which adequate provision had been made in their accounts to the satisfaction of the auditors. When the Indian Companies (Amendment) Act, 1936, was brought into force in January 1937 a similar notification was issued on the 16th January 1937.

"In a recent judgment the Bombay High Court has held that the notification of the 16th January 1937 issued under section 151 of the Indian Companies Act, 1913, is *ultra vires* in so far as it seeks to distinguish banks from other companies. The amendments to the Act sought to be made by the amending bill are designed to meet the objections pointed out by the Bombay High Court and to legalise the long-standing practice followed by the banks" (*vide* Statement of Objects and Reasons).

ACT No. I OF 1944.

CENTRAL EXCISES AND SALT ACT, 1944

[Recd. G.-G.'s assent on 24th February 1944.]

An Act to consolidate and amend the law relating to central duties of excise and to salt.

WHEREAS it is expedient to consolidate and amend the law relating to central duties of excise on goods manufactured or produced in British India and to salt;

It is hereby enacted as follows :—

Notes.—There were so far no less than 10 separate Excise Acts and 5 Acts relating to salt. The taxes on all the excisable articles were closely akin to one another and the methods of their collection followed the same general pattern. The present Act consolidates in a single enactment all the laws relating to the central duties of excise and to the tax on salt. The special reference of salt in the long title, preamble, short title, section 2 (d) and (e) and section 3 (1) have been added by the Legislature on the recommendation of the Select Committee, and recognise the peculiar status under the Constitution Act of Salt by emphasising the distinction between salt and other articles subjected to duties of central excises.

CHAPTER I

Short title, extent and commencement.

1. (1) This Act may be called the Central Excises and Salt Act, 1944 ;

(2) It extends to the whole of British India ;

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "broker" or "commission agent" means a person who in the ordinary course of business makes contracts for the sale or purchase of excisable goods for others ;

(b) "Central Excise Officer" means any officer of the Central Excise Department, or any person (including an officer of the Provincial Government) invested by the Central Board of Revenue with any of the powers of a Central Excise Officer under this Act ;

(c) "curing" includes wilting, drying, fermenting and any process for rendering an unmanufactured product fit for marketing or manufacture ;

(d) "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt ;

(e) "factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on ;

(f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product; and

(i) in relation to tobacco includes the preparation of cigarettes, cigars, cheroots, biris, cigarette or pipe or hookah tobacco, chewing tobacco or snuff; and

(ii) in relation to salt, includes collection, removal, preparation, steeping, evaporation, boiling, or any one or more of these processes, the separation or purification of salt obtained in the manufacture of saltpetre, the separation of salt from earth or other substance so as to produce alimentary salt, and the excavation or removal of natural saline deposits or efflorescence; and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account if those goods are intended for sale;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "sale" and "purchase," with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

(i) "saltpetre" includes *rasi*, *sajji*, and all other substances manufactured from saline earth, and *kharinun* and every form of sulphate or carbonate of soda;

(j) "salt factory" includes —

(i) a place used or intended to be used in the manufacture of salt and all embankments, reservoirs, condensing and evaporating pans, buildings and waste places situated within the limits of such place; as defined from time to time by the Collector of Central Excise;

(ii) all drying grounds and storage platforms and storehouses appertaining to any such place;

(iii) land on which salt is spontaneously produced;

and a "private salt factory" is one not solely owned or not solely worked by the Central Government;

(k) "wholesale dealer" means a person who buys or sells excisable goods wholesale for the purpose of trade or manufacture, and includes a broker or commission agent who, in addition to making contracts for the sale or purchase of excisable goods for others, stocks such goods belonging to others as an agent for the purpose of sale.

CHAPTER II

LEVY AND COLLECTION OF DUTY.

3. (1) There shall be levied and collected *Duties specified in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in British India, and a duty on salt manufactured in, or imported by land into, any part of British India as, and at the rates, set forth in the First Schedule.*

(2) The Central Government may, by notification in the official Gazette, fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the First Schedule as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force;

(3) Different tariff values may be fixed for different classes or descriptions of the same article.

4. Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold for delivery at the place of manufacture and at the time of its removal therefrom, without any abatement or deduction whatever except trade discount and the amount of duty then payable.

5. The Central Government may, by notification in the official Gazette, impose on any excisable goods other than salt brought into British India from the territory of any Indian State, not being territory which has been declared under section 5 of the Indian Tariff Act, 1934 (XXXII of 1934), to be foreign territory for the purposes of that section, a duty of customs equivalent to the duty imposed by this Act on the like goods produced or manufactured in British India.

6. The Central Government may, by notification in the official Gazette, provide that, from such date as may be specified in the notification, no person shall, except under the authority and in accordance with the terms and conditions of a licence granted under this Act, engage in —

(a) the production or manufacture or any process of the production or manufacture of

any specified excisable goods or of saltpetre or of any specified component parts or ingredients of such goods or of specified containers of such goods, or

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any excisable goods specified in this behalf in Part A of the Second Schedule.

7. Every licence under section 6 shall be granted for such area, if any, for such period, subject to such restrictions and conditions, and in such form and containing such particulars, as may be prescribed.

8. From such date as may be specified in this behalf by the Central Government by notification in the official Gazette, no person shall, except as provided by rules made under this Act, have in his possession any excisable goods specified in this behalf in Part B of the Second Schedule in excess of such quantity as may be prescribed for the purposes of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any one time by such a person.

9. Whoever commits any of the following offences, namely :—

(a) contravenes any of the provisions of a notification issued under section 6 or of section 8, or of a rule made under clause (iii) of sub-section (2) of section 37;

(b) evades the payment of any duty payable under this Act;

(c) fails to supply any information which he is required by rules made under this Act to supply, or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information ;

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section ;

shall, for every such offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

10. Any Court trying an offence under this Chapter may order the forfeiture to His Majesty of any goods in respect of which the Court is satisfied that an offence under this Chapter has been committed, and may also order the forfeiture of any receptacles, packages or coverings in which such goods are contained and the animals, vehicles, vessels or other

conveyances used in carrying the goods, and any implements or machinery used in the manufacture of the goods.

11. In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made thereunder, the officer empowered by the Central Board of Revenue to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person ; and if the amount payable is not so recovered he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the district in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land-revenue.

12. The Central Government may, by notification in the official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by section 3.

CHAPTER III

POWERS AND DUTIES OF OFFICERS AND LANDHOLDERS

13. (1) Any Central Excise officer duly empowered by the Central Government in this behalf may arrest any person whom he has reason to believe to be liable to punishment under this Act.

(2) Any person accused or reasonably suspected of committing an offence under this Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false, may be arrested by such officer in order that his name and residence may be ascertained.

14. (1) Any Central Excise officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

Provided that the exemptions under sections 132 and 133 of the Code of Civil Procedure shall be applicable to requisitions for attendance under this section.

(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code.

15. All officers of Police and Customs and all officers of Government engaged in the collection of land-revenue, and all village officers are hereby empowered and required to assist the Central Excise officers in the execution of this Act.

16. Every owner or occupier of land, and the agent of any such owner or occupier, in charge of the management of that land, if contraband excisable goods are manufactured thereon, shall in the absence of reasonable excuse be bound to give notice of such manufacture to a Magistrate, or to an officer of the Central Excise, Customs, Police, or Land Revenue Department, immediately the fact comes to his knowledge.

17. Any owner or occupier of land, or any agent of such owner or occupier in charge of the management of that land, who wilfully connives at any offence against the provisions of this Act or of any rules made thereunder shall for every such offence be punishable with imprisonment for

a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

18. All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898), relating respectively to searches and arrests made under that Code.

19. Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise officer within a reasonable distance, to the officer-in-charge of the nearest police-station.

20. The officer-in-charge of a police-station to whom any person is forwarded under section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate.

21. (1) When any person is forwarded under section 19 to a Central Excise officer empowered to send persons so arrested to a Magistrate, the Central Excise officer shall proceed to enquire into the charge against him.

(2) For this purpose the Central Excise officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police-station may exercise and is subject to under the Code of Criminal Procedure, 1898 (V of 1898), when investigating a cognizable case:

Provided that —

(a) if the Central Excise officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise officer may direct, to appear, if and when so required before the Magistrate having jurisdiction, and

shall make a full report of all the particulars of the case to his official superior.

22. Any Central Excise or other officer exercising powers under this Act or under the rules made thereunder who —

Vexatious search, seizure, etc., by Central Excise officer.

(a) without reasonable ground of suspicion searches or causes to be searched any house, boat or place;

(b) vexatiously and unnecessarily detains, searches or arrests any person;

(c) vexatiously and unnecessarily seizes the moveable property of any person, on pretence of seizing or searching for any article liable to confiscation under this Act;

(d) commits, as such officer, any other act to the injury of any person, without having reason to believe that such act is required for the execution of his duty;

shall, for every such offence, be punishable with fine which may extend to two thousand rupees.

Any person wilfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall be punishable with fine which may extend to two thousand rupees or with imprisonment for a term which may extend to two years or with both.

23. Any Central Excise officer who ceases *Failure of Central Excise officer in duty.* or refuses to perform or withdraws himself from the duties of his office, unless he has obtained the express written permission of the Collector of Central Excise, or has given to his superior officer two months' notice in writing of his intention or has other lawful excuse, shall on conviction before a Magistrate be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to three months' pay, or with both.

CHAPTER IV

TRANSPORT BY SEA

24. When any excisable goods are carried *Penalties for carrying excisable goods in certain vessels.* by sea in any vessel other than a vessel of the burden of three hundred tons and upwards, the owner and master of such vessel shall each be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Exceptions.

25. Nothing in section 24 applies to —

(a) any excisable goods covered by a

permit granted under rules made under this Act;

(b) any excisable goods covered by a pass granted by any officer whom the Central Board of Revenue may appoint in this behalf;

(c) such amount of excisable goods carried on board any vessel for consumption by her crew or by the passengers or animals (if any) on board as the Central Board of Revenue may from time to time exempt from the operation of section 24.

26. When any officer empowered by the *Power of stoppage, search and arrest.* Central Board of Revenue, to act under this section has reason to believe, from personal knowledge or from information taken down in writing, that any excisable goods are being carried, or have within the previous twenty-four hours been carried, in any vessel so as to render the owner or master of such vessel liable to the penalties imposed by section 24, he may require such vessel to be brought to and thereupon may —

(a) enter and search the vessel;

(b) require the master of the vessel to produce any documents in his possession relating to the vessel or the cargo thereof;

(c) seize the vessel if the officer has reason to believe it liable to confiscation under this Act, and cause it to be brought with its crew and cargo into any port in British India; and

(d) where any excisable goods are found on board the vessel, search and arrest without a warrant any person on board the vessel whom he has reason to believe to be punishable under section 24.

27. Any master of a vessel refusing or *Penalties for refusing officer.* neglecting to bring to the vessel or to produce his papers when required to do so by an officer acting under section 26, and any person obstructing any such officer in the performance of his duty, may be arrested by such officer without a warrant, and shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

28. (1) Every vessel (including all appurtenances) in which any *Confiscation of vessel and cargo.* excisable goods are carried so as to render the owner or master of such vessel liable to penalties imposed by section 24, the cargo on board such vessel and the excisable goods in respect of which an offence under this Act has been committed shall be liable to confiscation on the orders of the officer empowered in this behalf by the Central Government.

(2) Whenever any Customs-officer is satisfied that any article is liable to confiscation under this section he may seize such article, and shall at once report the seizure to his superior officer for the information of the officer empowered to order confiscation under sub-section (1) and such officer may, if satisfied on such report or after making such inquiry as he thinks fit, that the article so seized is liable to confiscation, either declare it to be confiscated, or impose a fine in lieu thereof not exceeding the value of the article.

29. Any offence punishable under section *Jurisdiction.* 24 or section 27 may be deemed to have been committed within the limits of the jurisdiction of the Magistrate of any place where the offender is found, or to which, if arrested under section 26 or section 27, he may be brought.

30. The Central Government may, by *Power to exempt from operation of this Chapter.* notification in the official Gazette, exempt the carriage of excisable goods within any local limits or in any class of vessels from the operation of this Chapter, and, by like notification, again subject such carriage to the operation of this Chapter.

CHAPTER V

SPECIAL PROVISIONS RELATING TO SALT

31. The proprietor of a private salt factory who has by virtue *Special and permanent rights of manufacturing salt to be recognised.* of a sanad granted by the British or any former Government, a special and permanent right to manufacture salt, or to excavate or collect natural salt, shall on application made in accordance with the rules made under this Act be entitled to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act, his licence has been cancelled by an officer duly empowered by the Central Government in this behalf.

32. Every proprietor of a private salt-work, *Rights of ordinary proprietors of existing salt-works.* other than a private salt factory, to which section 31 applies, of which under the provisions of section 17 of the Bombay Salt Act, 1890 (Bom. II of 1890), the proprietor was entitled on application to a licence to manufacture or to excavate or collect natural salt at such factory, shall continue to be entitled, on application made in accordance with the rules made under this Act, to a licence for such purpose and to the annual renewal thereof, unless on a breach of the provisions of this Act his licence has been cancelled by an officer duly empowered by the Central Government in this behalf :

Provided that the Collector of Central Excise may at any time withdraw or withhold a licence from the proprietor of any such salt factory, if no salt has been manufactured, excavated or collected in such salt factory for the three years ending on the thirtieth day of June last preceding the date of his order, or, with the previous sanction of the Central Board of Revenue, if such salt factory has not produced, on an average, during the said three years, at least five thousand maunds of salt per annum.

CHAPTER VI

ADJUDICATION OF CONFISCATIONS AND PENALTIES

33. Where by the rules made under this Act *Power of adjudication.* any thing is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged —

(a) without limit, by a Collector of Central Excise ;

(b) up to confiscation of goods not exceeding five hundred rupees in value and imposition of penalty not exceeding two hundred and fifty rupees, by an Assistant Collector of Central Excise :

Provided that the Central Board of Revenue may, in the case of any officer performing the duties of an Assistant Collector of Central Excise, reduce the limits indicated in clause (b) of this section, and may confer on any officer the powers indicated in clause (a) or (b) of this section.

34. Wherever confiscation is adjudged *Option to pay fine in lieu of confiscation.* under this Act or the rules made thereunder, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit.

35. (1) Any person deeming himself aggrieved by any decision *Appeals.* or order passed by a Central Excise officer under this Act or the rules made thereunder may, within three months from the date of such decision or order, appeal therefrom to the Central Board of Revenue, or, in such cases as the Central Government directs, to any Central Excise officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against :

Provided that no such order in appeal shall have the effect of subjecting any person to

any greater confiscation or penalty than has been adjudged against him in the original decision or order.

(2) Every order passed in appeal under this section shall, subject to the power of revision conferred by section 36, be final.

36. The Central Government may on the application of any person aggrieved by any decision or order passed under this Act or the rules made thereunder by any Central Excise officer or by the Central Board of Revenue, and from which no appeal lies, reverse or modify such decision or order.

CHAPTER VII

SUPPLEMENTAL PROVISIONS

Power of Central Government to make rules. **37. (1)** The Central Government may make rules to carry into effect the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may —

(i) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duties shall be payable, and the recovery of duty not paid ;

(ii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose;

(iii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the bringing of excisable goods into British India from the territory of any specified Prince or Chief in India, or the transit of excisable goods from any part of British India to any other part thereof;

(iv) regulate the removal of excisable goods from the place where produced, stored or manufactured or subjected to any process of production or manufacture and their transport to or from the premises of a licensed person, or a bonded warehouse, or to a market;

(v) regulate the production or manufacture, or any process of the production or manufacture, the possession, storage and sale of salt, and so far as such regulation is essential for the proper levy and collection of the duties imposed by this Act, of any other

excisable goods, or of any component parts or ingredients or containers thereof;

(vi) provide for the employment of officers of the Crown to supervise the carrying out of any rules made under this Act ;

(vii) require a manufacturer or the licensee of a warehouse to provide accommodation within the precincts of his factory or warehouse for officers employed to supervise the carrying out of regulations made under this Act and prescribe the scale of such accommodation ;

(viii) provide for the appointment, licensing, management and supervision of bonded warehouses and the procedure to be followed in entering goods into and clearing goods from such warehouses ;

(ix) provide for the distinguishing of goods which have been manufactured under licence, of materials which have been imported under licence, and of goods on which duty has been paid, or which are exempt from duty under this Act ;

(x) impose on persons engaged in the production or manufacture, storage or sale (whether on their own account or as brokers or commission agents) of salt, and, so far as such imposition is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods, the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and the manner in which they shall be verified ;

(xi) require that excisable goods shall not be sold or offered or kept for sale in British India except in prescribed containers, bearing a banderol, stamp or label of such nature and affixed in such manner as may be prescribed;

(xii) provide for the issue of licences and transport permits and the fees, if any, to be charged therefor :

Provided that the fees for the licensing of the manufacture and refining of salt and saltpetre shall not exceed, in the case of each such licence, the following amounts, namely :

	Rs.
Licence to manufacture and refine salt-petre and to separate and purify salt in the process of such manufacture and refining...	50
Licence to manufacture saltpetre ...	2
Licence to manufacture sulphate of soda (<i>Kharinun</i>) by solar heat in evaporating pans ...	10
Licence to manufacture sulphate of soda (<i>Kharinun</i>) by artificial heat...	2
Licence to manufacture other saline substances ...	2

(xiii) provide for the detention of goods, plant, machinery or material, for the purpose of exacting the duty, the procedure in connexion with the confiscation, otherwise than under section 10 or section 28, of goods in respect of which breaches of the Act or rules have been committed, and the disposal of goods so detained or confiscated ;

(xiv) authorise and regulate the inspection of factories and provide for the taking of samples, and for the making of tests, of any substance produced therein, and for the inspection or search of any place or conveyance used for the production, storage, sale or transport of salt, and so far as such inspection or search is essential for the proper levy and collection of the duties imposed by this Act, of any other excisable goods ;

(xv) authorise and regulate the composition of offences against, or liabilities incurred under, this Act or the rules made thereunder ;

(xvi) provide for the grant of a rebate of the duty paid on goods which are exported out of India or shipped for consumption on a voyage to any port outside India :

Provided that rules made under this clause shall provide that when steel ingots on which the duty of excise imposed by this Act has been paid, or articles of iron or steel manufactured in British India from such ingots, are exported out of India, there shall be payable to the exporter of such ingots or articles, subject to such conditions as may be prescribed, a refund at the following rates, namely :—

on ingots, blooms and billets —

a refund at the rate of four rupees per ton, on other manufactures of iron or steel —

(a) not fabricated—a refund at the rate of five and one-third rupees per ton ;

(b) fabricated—a refund at the rate of six rupees per ton ;

(xvii) exempt any goods from the whole or any part of the duty imposed by this Act ;

(xviii) define an area no point in which shall be more than one-hundred yards from the nearest point of any place in which salt is stored or sold by or on behalf of the Central Government, or of any factory in which salt-petre is manufactured or refined, and regulate the possession, storage and sale of salt within such area ;

(xix) define an area round any other place in which salt is manufactured, and regulate the possession, storage and sale of salt within such area ;

(xx) authorise the Central Board of Revenue or Collectors of Central Excise appointed

for the purposes of this Act to provide, by written instructions, for supplemental matters arising out of any rule made by the Central Government under this section.

(3) In making rules under this section, the Central Government may provide that any person committing a breach of any rule shall, where no other penalty is provided by this Act, be liable to a penalty not exceeding two thousand rupees and that any article in respect of which any such breach is committed shall be confiscated.

38. All rules made and notifications issued under this Act shall be made and issued by publication in the official Gazette. All such rules and notifications shall thereupon have effect as if enacted in this Act:

Provided that every such rule shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period for which the rule is so laid before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be.

39. The enactments specified in the Second Schedule are hereby repealed to the extent mentioned in the fourth column thereof. But all rules made, notifications published, licences, passes or permits granted, powers conferred and other things done under any such enactment and now in force shall, so far as they are not inconsistent with this Act, be deemed to have been respectively made, published, granted, conferred or done under this Act.

40. (1) No suit shall lie against the Central Government or against any officer of the Crown in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

(See section 3)

Notes.—The schedule, like the one in the Indian Tariff Act, 1934, sets the rates of duties leviable on each class of goods. These duties have been collected from the various Acts and reproduced in the schedule. No interference of any kind is made in them. Items 8 and 9 of the schedule accurately confine the incidence of the excise duty on sugar and tobacco within the limits imposed by the Acts which are now repealed by the present Act.

Item No.	Description of goods.	Rate of duty.
1	KEROSENE — “Kerosene” means any inflammable hydro-carbon (including any mixture of hydro-carbons or any liquid containing hydro-carbons but excluding motor-spirit) which — (i) is made from petroleum as defined in section 2 of the Indian Petroleum Act, 1899 (VIII of 1899), and (ii) is intended to be or is ordinarily used in liquid form for purposes of illumination.	The rate at which Customs duty is for the time being leviable under the Indian Tariff Act, 1934 (XXXII of 1934), read with any other enactment for the time being in force.
2	MATCHES — “Match” includes a firework in the form of a match; and, where a match-stick has more heads than one capable of being ignited by striking, each such head shall be deemed to be a match. (1) Matches, manufactured in a factory whose daily output exceeds one hundred gross of boxes, in boxes or booklets containing on an average — (i) not more than forty matches ... (ii) more than forty, but not more than fifty matches ... (iii) more than fifty, but not more than sixty matches ... (iv) more than sixty, but not more than eighty matches ... (2) Matches, manufactured in a factory whose daily output does not exceed one hundred gross of boxes, in boxes or booklets containing on an average — (i) not more than forty matches ... (ii) more than forty, but not more than fifty matches ... (iii) more than fifty, but not more than sixty matches ... (iv) more than sixty, but not more than eighty matches ... (3) Matches in boxes containing on an average not more than twelve matches of the type known as “Bengal Lights.” (4) All other matches ...	<div> <div>Two rupees ...</div> <div>Two rupees and eight annas.</div> <div>Three rupees ...</div> <div>Four rupees ...</div> </div> <div> <div>Per gross of boxes or booklets.</div> </div> <div> <div>One rupee, fifteen annas and two pies.</div> <div>Two rupees and seven annas.</div> <div>Two rupees, fourteen annas and nine pies.</div> <div>Three rupees, fourteen annas and four pies.</div> </div> <div> <div>Per gross of boxes or booklets.</div> </div> <div>Ten annas per gross of boxes.</div> <div>Eight annas for every 1,440 matches or fraction thereof.</div>
3	MECHANICAL LIGHTERS — “Mechanical Lighter” means any mechanical or chemical contrivance for causing ignition which is portable and which operates by producing a spark or flame whether by itself or when brought into contact with gas, and includes a mechanical lighter issued from a factory in an incomplete state or requiring for its completion the addition of a flint ...	Three rupees per lighter.
4	MOTOR SPIRIT — “Motor spirit” means — (a) any inflammable hydro-carbon (including any mixture of hydro-carbons or any liquid containing hydro-carbons) which is capable of being used for providing reasonably efficient motive power for any form of motor vehicle; and (b) power alcohol, that is, ethyl alcohol of any grade (including such alcohol when denatured or otherwise treated), which either by itself or in admixture with any such hydro-carbon, is capable of being used as aforesaid ...	Fifteen annas per imperial gallon.
5	SALT — “Salt” includes swamp salt, spontaneous salt, and salt or saline solutions made or produced from any saline substance or from salt earth.	For the year ending the 31st day of March, 1944, the rate fixed by section 2 of the Indian

Item No.	Description of goods.	Rate of duty.
		Finance Act, 1943 (VIII of 1943), read with section 5 of the Indian Finance (Supplementary and Extending) Act, 1931, and thereafter the rate fixed annually by Act of the Central Legislature.
6	SILVER	Three annas and seven and one-fifth pies per ounce Troy.
7	STEEL INGOTS	Four rupees per ton.
8	SUGAR, PRODUCED IN A FACTORY ORDINARILY USING POWER IN THE COURSE OF PRODUCTION OF SUGAR— “Sugar” means any form of sugar containing more than ninety per cent. of sucrose:— (1) Sugar other than Khandsari or Palmyra (2) Khandsari sugar — that is to say, sugar in the manufacture of which neither a vacuum pan nor a vacuum evaporator is employed. (3) Palmyra sugar — that is to say, sugar manufactured from jaggery obtained by boiling the juice of the palmyra palm.	Three rupees per cwt. Eight annas per cwt. Nil.
9	TOBACCO, CURED — “Tobacco” means any form of tobacco, whether cured or uncured, and whether manufactured or not, and includes the leaf, stalks and stem of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth; I. — Virginia Tobacco — A. — Flue-cured — (1) if intended for manufacture into — (a) cigarettes — (i) containing more than 20 per cent. weight of imported tobacco. (ii) containing 20 per cent. or less than 20 per cent. weight of imported tobacco. (iii) containing no imported tobacco (b) biris (c) cheroots (2) If intended for any other purpose B. — Air-cured II.—Country Tobacco— (1) if intended for manufacture into— (a) cigarettes (b) biris (c) cigars or cheroots (d) hookah tobacco (e) snuff (2) if intended for sale as chewing tobacco, whether manufactured or merely cured (3) if intended for any other purpose III.—Stalks, stems and other refuse of tobacco— (1) if intended for use in the preparation of any form of manufactured tobacco. (2) if intended to be used for agricultural purposes IV.—Tobacco manufactured into cigars & cheroots of which the value— (i) exceeds Rs. 30 a hundred (ii) exceeds Rs. 25 a hundred but does not exceed Rs. 30 a hundred. (iii) exceeds Rs. 20 a hundred but does not exceed Rs. 25 a hundred. (iv) exceeds Rs. 15 a hundred but does not exceed Rs. 20 a hundred. (v) exceeds Rs. 10 a hundred but does not exceed Rs. 15 a hundred. (vi) exceeds Rs. 5 a hundred but does not exceed Rs. 10 a hundred. (vii) exceeds Rs. 2-8-0 a hundred but does not exceed Rs. 5 a hundred. (viii) exceeds Re. 1-4-0 a hundred but does not exceed Rs. 2-8-0 a hundred. (ix) exceeds As. 10 but does not exceed Re. 1-4-0 a hundred.	One rupee and twelve annas. One rupee and four annas. Eight annas Six annas Two annas One rupee and twelve annas. Six annas Six annas Six annas Six annas Two annas One anna Six annas One anna Six annas One anna Six annas One anna Nil Six rupees Five rupees Four rupees Three rupees Two rupees One rupee Eight annas Four annas Two annas

Per lb.

Per lb.

Per hundred

Item No.	Description of goods.	Rate of Duty.
10	TYRES— "Tyre" means a pneumatic tyre in the manufacture of which rubber is used and includes the inner tube and the outer cover of such a tyre.	Ten per cent. <i>ad valorem</i> .
11	VEGETABLE PRODUCT— "Vegetable product" means any vegetable oil or fat which whether by itself or in admixture with any other substance, has by hydrogenation or by any other process been hardened for human consumption.	Five rupees per cwt.

THE SECOND SCHEDULE

(See sections 6 and 8)

PART A

Excisable goods specified for the purposes of section 6—

1. Tobacco.

PART B

Excisable goods specified for the purposes of section 8—

1. Tobacco.

THIRD SCHEDULE

(See section 39)

Year	No.	Short title.	Extent of repeal.
1879	XVI	... The Transport of Salt Act, 1879	... The whole.
1882	XII	... The Indian Salt Act, 1882	... The whole.
1889	IV	... The Madras Salt Act, 1889	... The whole.
	(Madras)		
1890	II	The Bombay Salt Act, 1890	... The whole.
	(Bombay)		
1908	X	... The Indian Salt-duties Act, 1908	... The whole.
1917	II	... The Motor Spirit (Duties) Act, 1917	... The whole.
1922	XII	... The Indian Finance Act, 1922	... The whole.
1930	XVIII	... The Silver (Excise Duty) Act, 1930	... The whole.
1931 The Indian Finance (Supplementary and Extending) Act, 1931.	... The whole.
1934	XIV	... The Sugar (Excise Duty) Act, 1934	... The whole.
1934	XVI	... The Matches (Excise Duty) Act, 1934	... The whole.
1934	XXIII	... The Mechanical Lighters (Excise Duty) Act, 1934	... The whole.
1934	XXXI	... The Iron and Steel Duties Act, 1934	... The whole.
1938	XIII	... The Sind Salt Law Amendment Act, 1938	... The whole.
1941	X	... The Tyres (Excise Duty) Act, 1941	... The whole.
1943	X	... The Tobacco (Excise Duty) Act, 1943	... The whole.
1943	XI	... The Vegetable Product (Excise Duty) Act, 1943	... The whole.

G. H. SPENCE,
Secy. to the Govt. of India.

ACT No. II OF 1944.

Coffee Market Expansion (Amendment) Act, 1944.

[Recd G.-G's assent on 27th February 1944.]

An Act further to amend the Coffee Market Expansion Act, 1942.

WHEREAS it is expedient further to amend the Coffee Market Expansion Act, 1942 (VII of 1942), for the purposes herein-after appearing;

It is hereby enacted as follows:—

Short title. 1. This Act may be called the Coffee Market Expansion (Amendment) Act, 1944.

Amendment of section 3, Act VII of 1942. 2. In section 3 of the Coffee Market Expansion Act, 1942 (7 of 1942) (hereinafter referred to as the said Act), after clause (e) the following clause shall be inserted namely:—

'(ee) "dealer" means a person carrying on the business of selling coffee, whether whole-sale or by retail;'

Amendment of section 36, Act VII of 1942. 3. In sub-section (1) of section 36 of the said

Act, after the words "any licensed curer" the words "or dealer" shall be inserted.

4. In sub-section (2) of section 40 of the *Amendment of section 40, Act VII of 1942.* said Act, after the words "Provincial Government" the following shall be inserted, namely:—

"or of the offence specified in sub-section (2) of section 16 except on complaint made by an officer authorised in this behalf either by the Provincial Government or by the Board."

Notes.—The new clause (ee) inserted in S. 3 of the Coffee Market Expansion Act, 1942, defines "a dealer" and the amendments made in S. 36 of the Act make him liable to prosecution for violating the provisions of sub-section (2) of S. 16 of the Act. The amendment of S. 40 prescribes the mode of launching such prosecution.

Coal Mines Safety (Stowing) Amendment Act, 1944.

[Recd. G.-G.'s assent on 7th March 1944.]

An Act further to amend the Coal Mines Safety (Stowing) Act, 1939.

WHEREAS it is expedient further to amend the Coal Mines Safety (Stowing) Act, 1939 (XIX of 1939), for the purposes hereinafter appearing;

It is hereby enacted as follows :—

1. This Act may be called the Coal Mines Safety (Stowing) Amendment Act, 1944.
Short title.

2. In sub-section (1) of section 8 of the Coal Mines Safety (Stowing) Act, 1939 (XIX of 1939) (hereinafter referred to as the said Act), in clause (iii), for the words "operations other than stowing" the words "stowing and other operations" shall be substituted.
Amendment of section 8, Act XIX of 1939.

Notes. — The amendment of S. 8 now makes it clear that the Coal Mines Stowing Fund can be utilised to defray cost of stowing operations when these are carried out by any other agency than the owner, agent or manager of the Coal Mines.

3. To section 10 of the said Act the following proviso shall be added, namely :—
Amendment of section 10, Act XIX of 1939.

"Provided that the power conferred by the proviso to sub-section (6) of the said section 19 to suspend the operation of a requisition under sub-section (1) of that section shall include a power similarly to suspend the operation of an order made under sub-section (3) of section 9 of this Act."

Insertion of new section 10A in Act XIX of 1939. 4. After section 10 of the said Act the following section shall be inserted, namely :—

"10A. *Powers of Board in executing operations.*—(1) If in the opinion of the Board it is necessary or desirable that any protective measures, including stowing, required in furtherance of the object of this Act, should be undertaken directly by the Board, the Board may execute or cause to be executed such measures under its own supervision.

(2) For the purposes of this section the Board shall have the right for itself and all persons employed in the execution of any work undertaken under this section to enter upon any property in which the work is to be done and to do therein all things necessary for the execution of the work.

(3) No person shall obstruct or interfere with the execution of any work undertaken under this section, and no person shall remove or tamper with any plant or machinery or any stowing or other material used in the execution of such work.

(4) Whoever contravenes the provisions of sub-section (3) shall be punishable with imprisonment for a term which may extend to six months or with fine or with both."

Notes. — Section 10A makes a specific provision which was lacking before, of conferring requisite powers on the Coal Mines Stowing Board to execute protective measures under its own supervision in cases of emergency including the power to enter upon the property in which the execution of the work is undertaken.

ACT NO. IV OF 1944.**Indian Companies (Amendment) Act, 1944.**

[Recd. G.-G.'s assent on 7th March 1944.]

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913 (VII of 1913), for the purposes hereinafter appearing;

It is hereby enacted as follows :—

1. (1) This Act may be called the Indian Companies (Amendment) Act, 1944.
Short title and commencement.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. After section 277H of the Indian Companies Act, 1913 (VII of 1913) hereinafter referred to as the said Act), the following section shall be
Insertion of new section after section 277H, Act VII of 1913.

inserted, namely :—

"277HH.—*Prohibition of employment of managing agents and restrictions on certain forms of employment.* — No banking company, whether incorporated in or outside British India, which carries on business in British India, shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, employ or be managed by a managing agent, or any person whose remuneration or part of whose remuneration takes the form of commission or a share in the profits of the company, or any person having a contract with the company for its management for a period exceed.

ing five years at any one time :

Provided that the period of five years shall, for the purposes of this section, be computed from the date on which this section comes into force :

Provided further that any such contract may be renewed or extended for a further period not exceeding five years at a time if and so often as the directors think fit."

Substitution of new section for section 277I, Act VII of 1913. 3. For section 277I of the said Act the following section shall be substituted, namely :—

"277I. *Restrictions on commencement of business and conditions for carrying on business by banking company.* — (1) Notwithstanding anything contained in section 103, no banking company incorporated under this Act on or after the 15th day of January 1937, shall commence business unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as working capital, and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid up capital has been filed with the registrar.

(2) No banking company, whether incorporated in or outside British India, if incorporated on or after the 15th day of January 1937, shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, carry on business in British India unless it satisfies the following conditions, namely :—

(a) that the subscribed capital of the company is not less than half the authorised capital, and the paid up capital is not less than half the subscribed capital, and

(b) that the capital of the company consists of ordinary shares only, or ordinary shares and such preference shares as may have been issued before the commencement of the Indian Companies (Amendment) Act, 1944, only, and

(c) that the voting rights of all shareholders are strictly proportionate to the contribution made by the shareholder, whether a preference shareholder or an ordinary shareholder, to the paid up capital of the company."

4. In sub-section (4) of section 277L of the said Act, after the word, *Amendment of section 277L, Act VII of 1913.* figures and letter "section 277H" the words, figures and letters "section 277HH, section 277I" shall be inserted.

Notes. — There were certain undesirable and objectionable features in the structure and management of banking companies, such as (1) the appointment of managing directors, or managers on long-term contracts on payment of remuneration by commission or a share in the profits, (2) the fixation of the authorised capital at a very high figure as compared with the subscribed and paid up capital and (3) the possession of large voting rights by an individual or group of individuals usually partly paid ordinary or deferred shareholders. The first was contrary to the spirit of S. 277H of the Companies Act, the second gave the public a false impression of the status and importance of the bank and the third enabled the voters to control the companies' activities thereby facilitating the undertaking of unsafe or speculative business to the detriment of the interests of the depositors. The insertion of new S. 277HH and the substitution of new S. 277I in the Companies Act now remove the above objectionable features.

ACT NO. V OF 1944.

Indian Aircraft (Amendment) Act, 1944.

[Recd. G.-G.'s assent on 7th March 1944.]

An Act further to amend the Indian Aircraft Act, 1934.

WHEREAS it is expedient further to amend the Indian Aircraft Act, 1934 (XXII of 1934), for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Aircraft (Amendment) Act, 1944.

2. In sub-section (2) of section 5 of the *Amendment of section 5, Act XXII of 1934.* Indian Aircraft Act, 1934 (XXII of 1934), after clause (a) the following clauses shall be inserted, namely :—

"(aa) the regulation of air transport services, and the prohibition of the use of aircraft in such services except under the authority of and in accordance with a licence

authorising the establishment of the service ;

(ab) the information to be furnished by an applicant for, or the holder of, a licence authorising the establishment of an air transport service to such authorities as may be specified in the rules ;"

3. After sub-section (2) of section 5 of the *Further amendment of section 5, Act XXII of 1934.* Indian Aircraft Act, 1934 (XXII of 1934), the following sub-section shall be added, namely :—

"(3) *Rules to be laid before both Chambers.*—Every rule made under this section shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature, while it is in session, for

a total period of one month which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period for which the rule is so laid, before one Chamber does not coincide with that for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have

effect only in such modified form or be of no effect, as the case may be."

Notes.—There is evidence of considerable interest both in India and abroad in the development of aviation in India. Plans for the establishment of air transport services are being prepared for consideration by the Government. The present amendment of S. 5 of the Aircraft Act makes provision for the control and regulation of such services, so that the development may proceed on rational and economic basis. The newly added sub-section (3) provides that rules made under the section shall be laid before both the Chambers of the Central Legislature for approval or modification.

ACT No. VI OF 1944.

Transfer of Property (Amendment) Act, 1944.

[Recd. G.-G.'s assent on 7th March 1944.]

WHEREAS it is expedient further to amend the Transfer of Property Act, 1882 (IV of 1882), for the purposes hereinafter appearing ;

It is hereby enacted as follows:—

1. This Act may be called the Transfer of Property (Amendment) Act, 1944.

Short title.

2. After section 130 of the Transfer of Property Act, 1882 (IV of 1882) (hereinafter referred to as the said Act), the following section shall be inserted namely:—

"130A. *Transfer of policy of marine insurance.*—(1) A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.

(2) A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.

(3) Where the insured person has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this sub-section affects the assignment of a policy after loss.

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section."

Substitution of new section for section 135, Act IV of 1882.

3. For section 135 of the said Act the following section shall be substituted, namely:—

"*Assignment of rights under policy of insurance against fire.*—Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely

vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself."

Insertion of new section 135A in Act IV of 1882. 4. After section 135 of the said Act, as substituted by this Act, the following section shall be inserted, namely:—

"135A. *Assignment of rights under policy of marine insurance.*—(1) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(2) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss.

(4) Nothing in clause (e) of section 6 shall affect the provisions of this section."

Notes.—"The rules and principles governing a marine insurance policy being materially different

from those governing a fire-insurance policy, it is very unsatisfactory to accord the same treatment in the matter of assignment of both categories of policies. . . . In the united kingdom, assignability of marine insurance policies after loss is placed beyond doubt by S. 50 of the Marine Insurance Act. But in the absence of a similar provision here, it is doubtful

if the Courts in British India would hold that they are so assignable. It is proposed, therefore, to amend the Transfer of Property Act by (1) omitting from section 135 thereof the reference to marine insurance policy ; and (2) inserting a new section reproducing the provisions of S. 50 of the Marine Insurance Act."—*Vide* Statement of Objects and Reasons.

ACT NO. VII OF 1944.

Insurance (Amendment) Act, 1944.

[Recd. G.-G.'s assent on 7th March 1944.]

An Act further to amend the Insurance Act, 1938.

WHEREAS it is expedient further to amend the Insurance Act, 1938 (IV of 1938), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Insurance
Short title. (Amendment) Act, 1944.

2. To section 46 of the Insurance Act, 1938
Amendment of section 46, Act IV of 1938. (IV of 1938) (hereinafter referred to as the said Act), the following proviso shall be added, namely :—

"Provided that nothing in this section shall apply to a policy of marine insurance."

Amendment of section 48, Act IV of 1938. 3. In section 48 of the said Act, —

(a) in sub-section (2) before the words "be eligible for election as directors" the following shall be inserted, namely :—

"unless disqualified under sub-section (2A)";

(b) after sub-section (2) the following sub-section shall be inserted, namely :—

"(2A) A person shall be ineligible for election as a director under sub-section (1) of any company if he is a director, officer, employee, or legal or technical adviser of that company, or of any other insurer, or is an insurance agent or employer of insurance agents, and shall cease to be a director under sub-section (1) if after election he acquires any disqualification specified in this sub-section or no longer holds the qualifications required by sub-section (2) :

Provided that nothing in this sub-section shall disqualify a person who is an elected director under sub-section (1) and is not otherwise disqualified under this sub-section, from being re-elected :

Provided further that any director holding office at the commencement of the Insurance (Amendment) Act, 1944, shall not become ineligible to remain a director by virtue of this sub-section until the expiry of six months from the commencement of that Act."

Amendment of Third Schedule, Act IV of 1938.

4. In the Third Schedule to the said Act,—

(a) in Part 1, in Regulation 2, after the words "appropriate for fire insurance" the words "and for marine insurance" shall be inserted, and the sentence "Form E is, as set out in Part 2 of this Schedule, appropriate for marine insurance business" shall be omitted ;

(b) in Part 2, Form E shall be omitted, and in Form F, for the words "and to" in the heading the words "Marine Insurance Business and" shall be substituted, and for the entry "United Kingdom, Foreign and Dominion Taxes" in the first column the entry "United Kingdom, British Indian, Dominion and Foreign Taxes" shall be substituted.

5. An insurer preparing in compliance with
Transitory provision. section 11 or section 16 of the Insurance Act, 1938 (IV of 1938), a revenue account in respect of marine insurance with reference to any year ending on any date before the 1st day of January 1945, may prepare it in accordance with the Third Schedule to that Act either as it stood before or as it stands after its amendment by this Act.

Notes.—"The application of S. 46, Insurance Act, to policies of marine insurance seriously interferes with the normal business of marine insurance inasmuch as marine insurance contracts are international in scope and are effected mostly for the benefit of the consignees abroad who have the option of stipulating the place where contracts are intended to be carried out. Under S. 48 (2) of the Act employees and agents of insurance companies are eligible for appointment as policy-holders' directors. This is destructive of the object of S. 48 since a policy-holder who is an employee or agent of an insurance company cannot be expected to safeguard the interests of policy-holders where those interests conflict with those of the share-holders. Such persons should therefore be disqualified from becoming policy-holders' directors." — *Vide* Statement of Objects and Reasons. The amendment of Ss. 46 and 48 now removes these defects.

ACT NO. VIII OF 1944.

Cantonments (Amendment) Act, 1944.

[Recd. G.-G.'s assent on 17th March 1944.]

An Act further to amend the Cantonments Act, 1924.

WHEREAS it is expedient further to amend the Cantonments Act, 1924, (II of 1924), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Cantonments (Amendment) Act, 1944.

2. To section 3 of the Cantonments Act, 1924 (II of 1924), (herein-
Amendment of section 3, Act II of 1924. after referred to as the said Act), the following sub-section shall be added, namely :—

“(4) The Central Government may, by notification in the official Gazette, direct that in any place declared a cantonment under sub-section (1) the provisions of any enactment relating to local self-government other than this Act shall have effect only to such extent or subject to such modifications, or that any authority constituted under any such enactment shall exercise authority only to such extent, as may be specified in the notification.”

3. To sub-section (1) of section 15 of the said Act, after the first
Amendment of section 15, Act II of 1924. proviso, the following proviso shall be added, namely :—

“Provided further that until the termination of the hostilities in being at the commencement of the Cantonments (Amendment) Act, 1944, the foregoing proviso shall have effect as if the word ‘elected’ and the words ‘not exceeding one year’ were omitted.”

Notes. — The new proviso confers the power to postpone elections and continue the existing Boards for a period longer than one year in order to curtail unnecessary expenditure and to avoid the loss of time caused by the holding of elections.

4. In sub-section (1) of section 28 of the said Act, after the words
Amendment of section 28, Act II of 1924. “not being a person” the words “in receipt of pay” shall be inserted.

5. In clause (f) of section 31 of the said Act, after the words “the
Amendment of section 31, Act II of 1924. authority” the brackets and words “(which may be an officer of the Provincial Government)” shall be inserted.

6. In section 126 of the said Act, for the words “may, by notice
Amendment of section 126, Act II of 1924. in writing” the words “by notice in writing may” shall be substituted and for the words “either to remove the same or to repair” the words “to remove the same, or may require him to repair” shall be substituted.

Notes. — There was a conflict of opinion as to whether S. 126 requires the Board to give, to the owner of property in regard to which action is taken under the section, an option either to remove the same or to repair it or whether the Board can require the removal without such option. The present amendment now sets the conflict at rest by establishing the latter view.

7. To sub-section (3) of section 215 of the said Act the following words shall be added, namely :—

“who shall give orders as to its disposal.”

8. In sub-section (2) of section 216 of the said Act, for the word
Amendment of section 216, Act II of 1924. “Board” where it occurs for the second time, the words “President of the Board” shall be substituted.

ACT NO. IX OF 1944.

Indian Merchant Shipping (Amendment) Act, 1944.

[Recd G.-G.'s assent on 27th March 1944.]

An Act further to amend the Indian Merchant Shipping Act, 1923.

WHEREAS it is expedient further to amend the Indian Merchant Shipping Act, 1923 (21 of 1923), for a certain purpose ;

It is hereby enacted as follows :—

1944 Acts/3b, 4 & 5a

Short title and commencement. 1. (1) This Act may be called the Indian Merchant Shipping (Amendment) Act, 1944.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. In sub-section (1) of section 209A of the *Amendment of Indian Merchant Shipping Act, 1923* (21 of 1923), after the words "together with a sum of one rupee for each

day" the words "in respect of a deck pilgrim and a sum of three rupees for each day in respect of a cabin class pilgrim" shall be inserted.

Notes. — The amendment seeks to increase the rate of compensation to be paid, under sub-s. (1) of S. 209A of the Indian Merchant Shipping Act, 1923, to pilgrims travelling in cabins in view of the fact that such pilgrims have to pay more money in the shape of fares including the cost of food.

THE INDIAN FINANCE ACT, 1944.

An Act to give effect to the financial proposals of the Central Government for the year beginning on the 1st day of April 1944.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, British India, to fix maximum rates of postage under the Indian Post Office Act, 1898 (VI of 1898), to continue for a further period of one year the additional duties of customs imposed by section 6 of the Indian Finance Act, 1942 (XII of 1942), and to increase certain of those duties, to alter the duty of excise on tobacco and to impose duties of excise on betel-nuts, coffee and tea, to fix rates of income-tax and super-tax, and to continue the charge and levy of excess profits tax and make certain additional provisions relating thereto ;

It is hereby enacted as follows :—

Notes.—This Act continues for a further period of one year the existing rate of salt duty, inland postage rates and duties of customs imposed by S. 6 of the Finance Act of 1942. It alters the duty of excise on tobacco, imposes duties of excise on betel-nuts, coffee and tea and increases the corporation tax, the central surcharge on income-tax and super-tax and fixes the deposit of excess profits tax.

Short title and extent. 1. (1) This Act may be called the Indian Finance Act, 1944.

(2) It extends to the whole of British India.

2. The duty on salt manufactured in, or *Fixation of salt duty.* imported by land into, British India shall, for the year beginning on the 1st day of April, 1944, be at the rate of one rupee and nine annas per standard maund.

3. For the year beginning on the 1st day *Inland postage rates.* of April, 1944, the Schedule contained in Sche-

dule I to the Indian Finance Act, 1943 (VIII of 1943), shall again be inserted in the Indian Post Office Act, 1898 (VI of 1898), as the First Schedule to that Act.

4. (1) The additional duties of customs *Continuation of, and enhancement of, additional duties of customs imposed by section 6, Act XII of 1942.* on certain goods chargeable with a duty of customs under the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), or under the said Schedule read with any notification of the Central Government for the time being in force, imposed up to the 31st day of March, 1943, by section 6 of the Indian Finance Act, 1942 (XII of 1942), and continued up to the 31st day of March, 1944, by section 4 of the Indian Finance Act, 1943 (VIII of 1943), shall continue to be levied and collected as provided in section 6 of the Indian Finance Act, 1942 (XII of 1942), up to the 31st day of March 1945, subject to the modification contained in sub-section (2).

(2) The additional duty to be levied and collected under the foregoing sub-section shall be one-half instead of one-fifth of the amount of the duty of customs specified in the First Schedule to the Indian Tariff Act, 1934 (XXXII of 1934), in the case of the following goods, namely :—

(a) spirits, comprised in Item No. 22 (4) and in Item No. 22 (5) of the said Schedule ;

(b) tobacco, comprised in Item No. 24 and in Item No. 24 (3) of the said Schedule ;

(c) cigars, comprised in Item No. 24 (1) of the said Schedule ;

(d) cigarettes, comprised in Item No. 24 (2) of the said Schedule.

5. The amendments set out in Part I and Part II of the First Schedule shall be made respectively in the First and Second Schedules to the Central Excises and Salt Act, 1944 (I of 1944).

Income-tax and super-tax.

6. (1) Subject to the provisions of sub-sections (2), (3) and (5),—

(a) income-tax for the year beginning on the 1st day of April, 1944, shall be charged at the rates specified in Part I of the Second Schedule increased in each case by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of income-tax, and

(b) rates of super-tax for the year beginning on the 1st day of April, 1944, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922 (XI of 1922), be those specified in Part II of the Second Schedule increased in the cases to which paragraphs A, B and C of that Part apply by a surcharge for the purposes of the Central Government at the rate specified therein in respect of each such rate of super-tax.

(2) In making any assessment for the year ending on the 31st day of March, 1945,—

(a) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" or under the head "Interest on Securities" or any income from dividends in respect of which he is deemed under section 49B of the Indian Income-tax Act, 1922 (XI of 1922), to have paid income-tax imposed in British India, the income-tax payable by the assessee on that part of his total income which consists of such inclusions shall be an amount bearing to the total amount of income-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943), on his total income the same proportion as the amount of such inclusions bears to his total income;

(b) where the total income of an assessee, not being a company, includes any income chargeable under the head "Salaries" on which super-tax has been or might have been deducted under the provisions of sub-section (2) of section 18 of the Indian Income-tax Act, 1922 (XI of 1922), the super-tax payable by the assessee on that portion of his total income which consists of such inclusions shall be an amount bearing to the total amount of super-tax payable according to the rates applicable under the operation of the Indian Finance Act, 1943 (VIII of 1943), on his total

income the same proportion as the amount of such inclusions bears to his total income.

(3) In making any assessment for the year ending on the 31st day of March, 1944, or the year ending on the 31st day of March, 1945,—

(a) where the total income of a company includes any profits and gains from life insurance business the super-tax payable by the company on that part of its total income which consists of such inclusion shall be in the case of an assessment for the first mentioned year at the rate of one anna and one pie in the rupee and in the case of an assessment for the second mentioned year at the rate of nine pies in the rupee;

(b) where the total income of an assessee, not being a company, includes any profits and gains from life insurance business the income-tax and super-tax payable by the assessee on that part of his total income which consists of such inclusion shall be an amount bearing to the total amount of such taxes payable according to the rates applicable under the operation of the Indian Finance Act, 1942 (XII of 1942), on his total income the same proportion as the amount of such inclusion bears to his total income, so, however, that if the aggregate of the taxes so computed in respect of such inclusion exceeds the aggregate of the taxes on the same income payable by a company under the operation of the Indian Finance Act, 1942 (XII of 1942), the taxes payable on such inclusion shall be computed at the rates applicable to a company under the operation of the said Act.

(4) Where any assessment for the year ending on the 31st day of March, 1944, to which clause (a) or (b) of sub-section (3) is applicable has been completed at the rates of tax in operation under the Indian Finance Act, 1943 (VIII of 1943), it shall be revised by the Income-tax Officer in accordance with the provisions of clause (a) or (b), as the case may be, of sub-section (3) and the excess tax paid, if any, shall be refunded.

(5) In cases to which section 17 of the Indian Income-tax Act, 1922 (XI of 1922), applies, the tax chargeable shall be determined as provided in that section but with reference to the rates imposed by sub-section (1) of this section, and in accordance with the provisions of sub-sections (2) and (3) of this section where applicable.

(6) for the purposes of this section and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance

with the provisions of the Indian Income-tax Act, 1922 (XI of 1922).

(7) Where the total income of an assessee referred to in paragraph A of Part I of the Second Schedule does not exceed six thousand rupees, an amount representing one rupee for every complete unit of two hundred rupees of his total income as reduced by the income, if any, exempt from tax under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or any notification issued thereunder shall be funded for the assessee's benefit and shall be paid to him on such date, not more than twelve months after the termination of the present hostilities, as the Central Government may fix.

Explanation.—In computing the amount to be funded under this sub-section if there is an incomplete unit amounting to one hundred rupees or more it shall be reckoned as a complete unit of two hundred rupees.

(8) The provisions of section 23A of the Indian Income-tax Act, 1922 (XI of 1922), shall not apply in respect of profits and gains of the previous year for the assessment for the year ending on the 31st day of March, 1945.

7. (1) In sub-clause (a) of clause (6) of section 2 of the Excess Profits Tax Act, 1940 (XV of 1940), for the words and figures "31st day of March, 1944," the words and figures "31st day of March, 1945," shall be substituted.

(2) The excess profits tax imposed by section 4 of the Excess Profits Tax Act, 1940 (XV of 1940), shall, in respect of any chargeable accounting period beginning after the 31st day of March, 1944, be an amount equal to sixty-six and two-thirds per cent. of the amount by which the profits of the business during that chargeable accounting period exceed the standard profits.

Further provisions respecting excess profits tax. 8. (1) In sub-rule (1) of rule 2 of the Second Schedule to the Excess Profits Tax Act, 1940 (XV of 1940),—

(a) for the words "and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted" the following shall be substituted, namely:—

"and in particular there shall be deducted any debts incurred in respect of the business for income-tax or super-tax or excess profits tax, or for advance payments due under any provision of the Indian Income-tax Act, 1922 (XI of 1922), or for any further sum payable in relation to excess profits tax under section

2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943).";

(b) after clause (b) of the proviso the following clauses shall be inserted, namely:—

"(c) in the case of any advance payment due under any provision of the Indian Income-tax Act, 1922 (XI of 1922), on the date on which, under the provisions of that section, the payment first became due;

(d) in the case of any further sum payable in relation to excess profits tax under section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943), on the date on which, under the provisions of that section, the further sum became payable."

(2) To sub-section (1) of section 10 of the Indian Finance Act, 1942 (XII of 1942), the following proviso shall be added, namely:—

"Provided further that in respect of chargeable accounting periods ending after the 31st day of December, 1943, the amount repayable under this sub-section shall, subject to the provisions of the first of the foregoing provisos, be calculated by reference to the amount of the excess profits tax paid, and not by reference to the further amount deposited under this section."

(3) In section 2 of the Excess Profits Tax Ordinance, 1943 (XVI of 1943),—

(a) to sub-section (1) the following provisos shall be added, namely:—

"Provided that, in respect of any chargeable accounting period ending after the 31st day of December, 1943, the provisions of this sub-section shall have effect as if, in relation to any person who is a company, for the words 'one-fifth' the words 'nineteen-sixty-fourths' were substituted and as if, in relation to any other person, for the words 'one-fifth' the words 'seventeen-sixtyfourths' were substituted:

Provided further that if, in respect of any chargeable accounting period ending after the 31st day of December, 1943, a person who has deposited a further sum equal to seventeen-sixtyfourths of the excess profits tax payable shows that the amount of the income-tax and super-tax payable in respect of the excess profits arising in such period exceeds fifteen-sixtyfourths of the amount of the excess profits tax payable, so much of the deposit shall be refunded as will secure that the total of the deposit made and the income-tax and super-tax payable in respect of the excess profits arising in such period does not exceed one-half of the excess profits tax payable";

(b) after sub-section (1) the following sub-section shall be inserted, namely:—

"(1A) In respect of any chargeable accounting period ending after the 31st day of December, 1943, in respect of which a provisional assessment of excess profits tax is made under section 14A of the Excess Profits Tax Act, 1940 (XV of 1940), the person liable to pay such excess profits tax shall deposit in the manner laid down in sub-section (1) a further sum equal to nineteen-sixtyfourths of the amount of the said excess profits tax if such person is a company and seventeen-sixtyfourths of the said amount if such person

is not a company; and the provisions of sub-sections (6) and (7) of the said section 14A shall apply to any payment made under this sub-section as they apply to a payment of excess profits tax."

(c) in sub-section (4) for the words, brackets and figure "sub-section (1) of this section," where they occur for the first time, the words, brackets, figures and letter "sub-section (1) or (1A) of this section" shall be substituted.

THE FIRST SCHEDULE.

(See section 5.)

Amendments to be made in the Central Excises and Salt Act, 1944 (1 of 1944).

PART I.

Amendments of FIRST SCHEDULE.

1. For Item No. 9, the following item shall be substituted, namely :—

' 9. TOBACCO—

" Tobacco " means any form of tobacco, whether cured or uncured, and whether manufactured or not, and includes the leaf, stalk and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth.

I. Unmanufactured tobacco —

(1) if flue-cured and intended for—

(a) manufacture into cigarettes containing—

	Per lb.
(i) more than 20 per cent. weight of imported tobacco ...	Three rupees and eight annas.
(ii) 20 per cent. or less than 20 per cent. weight of imported tobacco ...	Two rupees and eight annas.
(iii) no imported tobacco ...	One rupee.
(b) any purpose other than the manufacture of cigarettes or of the products enumerated in (3) (a) and (3) (b) ...	Three rupees and eight annas.

(2) if other than flue-cured and intended for—

(a) manufacture into cigarettes ...	Nine annas.
(b) any purpose other than the manufacture of cigarettes or of the products enumerated in (3) (a) and (3) (b) ...	Nine annas.

(3) whether flue-cured or not, if intended for—

(a) manufacture into—

(i) biris ...	Nine annas.
(ii) snuff ...	Nine annas.
(iii) cigars and cheroots ...	Three annas.
(iv) hookah tobacco ...	Three annas.
(b) sale as chewing tobacco, whether manufactured or merely cured ...	Three annas.
(c) agricultural purposes ...	Nil.

(4) Stalks, stems and other refuse of tobacco intended for use in the preparation of any form of manufactured tobacco ... One anna.

II. Manufactured tobacco—

Cigars and cheroots of which the value—

	Per hundred.
(i) exceeds Rs. 30 a hundred ...	Twelve rupees.
(ii) exceeds Rs. 25 a hundred but does not exceed Rs. 30 a hundred ...	Ten rupees.
(iii) exceeds Rs. 20 a hundred but does not exceed Rs. 25 a hundred ...	Eight rupees.
(iv) exceeds Rs. 15 a hundred but does not exceed Rs. 20 a hundred ...	Six rupees.
(v) exceeds Rs. 10 a hundred but does not exceed Rs. 15 a hundred ...	Four rupees.
(vi) exceeds Rs. 5 a hundred but does not exceed Rs. 10 a hundred ...	Two rupees.
(vii) exceeds Rs. 2-8 a hundred but does not exceed Rs. 5 a hundred ...	One rupee.
(viii) exceeds Rs. 1-4 a hundred but does not exceed Rs. 2-8 a hundred ...	Eight annas.
(ix) exceeds Annas 12 a hundred but does not exceed Rs. 1-4 a hundred ...	Four annas.

2. After item No. 11, the following items shall be added, namely :—

‘12. BETEL-NUTS, cured—

“ Betel-nut ” means the fruit of the areca-palm (*areca catechu*), whether with or without husk, whether cured or uncured, but does not include the fruit while still attached to the tree ... Two annas per lb.

13. COFFEE, cured—

“ Coffee ” means the seed of the coffee tree (*coffea*), whether with or without husk, whether cured or uncured, but does not include the seed while still attached to the tree ... Two annas per lb.

14. TEA—

“ Tea ” means the commodity known as tea made from the leaves of the plant *Camellia Thea* (Linn.) and includes green tea ... Two annas per lb.’

PART II.

Amendment of SECOND SCHEDULE.

In PART A after Item No. 1 (Tobacco) the following shall be added, namely :—

“ 2. Betel-nuts } When supplied by a curer to a wholesale dealer, whether directly or through a
3. Coffee. } broker or commission agent.”

THE SECOND SCHEDULE.

(See section 6.)

PART I.

Rates of Income-tax.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons not being a case to which paragraph B of this Part applies :—

	Rate.	Surcharge.
1. On the first Rs. 1500 of total income ...	Nil.	Nil.
2. On the next Rs. 3500 of total income ...	Nine pies in the rupee.	Six pies in the rupee.
3. On the next Rs. 5000 of total income ...	One anna and three pies in the rupee.	Ten pies in the rupee.
4. On the next Rs. 5000 of total income ...	Two annas in the rupee.	One anna and six pies in the rupee.
5. On the balance of total income ...	Two annas and six pies in the rupee.	Two annas in the rupee.

Provided that—

(i) no income-tax shall be payable on a total income which does not exceed Rs. 2000 ;

(ii) the income-tax payable shall in no case exceed half the amount by which the total income exceeds Rs. 2000.

B.—In the case of every company and local authority, and in every case in which under the provisions of the Indian Income-tax Act, 1922, income-tax is to be charged at the maximum rate—

	Rate.	Surcharge.
On the whole of total income ...	Two annas and six pies in the rupee.	Two annas in the rupee.

PART II.

Rates of Super-tax.

A.—In the case of every individual, Hindu undivided family, unregistered firm and other association of persons, not being a case to which paragraphs B and C of this Part apply—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income ...	Nil.	Nil.
2. On the next Rs. 10,000 of total income ...	One anna in the rupee.	One anna in the rupee.
3. On the next Rs. 20,000 of total income ...	Two annas in the rupee.	Two annas in the rupee.
4. On the next Rs. 70,000 of total income ...	Three annas in the rupee.	Two annas and six pies in the rupee.
5. On the next Rs. 75,000 of total income ...	Four annas in the rupee.	Three annas in the rupee.
6. On the next Rs. 1,50,000 of total income ...	Five annas in the rupee.	Three annas in the rupee.
7. On the next Rs. 1,50,000 of total income ...	Six annas in the rupee.	Three annas in the rupee.
8. On the balance of total income ...	Seven annas in the rupee.	Three annas and six pies in the rupee.

B.—In the case of every local authority—

On the whole of total income ...	One anna in the rupee.	One anna in the rupee.
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C.—In the case of an association of persons being a co-operative society, other than the Sanikatta Salt Owners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies—

	Rate.	Surcharge.
1. On the first Rs. 25,000 of total income	Nil.	Nil.
2. On the balance of total income	One anna in the rupee.	One anna in the rupee.

D.—In the case of every company —

	Rate.
On the whole of total income	Three annas in the rupee :

Provided that a rebate of one anna in the rupee shall be allowed on the total income as reduced by the amount of any dividend declared in British India in respect of the profits of the previous year for the assessment for the year ending on the 31st day of March, 1945, not being a dividend payable at a fixed rate or a dividend declared on or before the 29th day of February, 1944, by a company to which but for sub-section (8) of section 6 of this Act, section 23A of the Indian Income-tax Act, 1922 (XI of 1922), would be applicable.

This Bill has been consented to by the Council of State.

The 31st March, 1944.

M. B. DADABHOY,
President, Council of State.

I assent to this Bill.

The 31st March, 1944.

WAVELL,
Viceroy and Governor General.

This Act has been made by me as Governor General under the provisions of section 67B of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935.

The 31st March, 1944.

WAVELL,
Viceroy and Governor General.

WHEREAS I, Archibald Percival, Viscount Wavell, am of opinion that a state of emergency exists which justifies the direction by me that the Indian Finance Act, 1944, being an Act made by me under the provisions of section 67B of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935, shall come into operation forthwith :

Now, THEREFORE, in exercise of the power conferred by the proviso to sub-section (2) of that section, I do hereby direct accordingly.

The 31st March, 1944.

WAVELL,
Viceroy and Governor General.

ACT NO. X OF 1944.

Indian Coconut Committee Act, 1944.

[Recd. G.G.'s assent on 31st March 1944.]

An Act to provide for the creation of a fund for the improvement and development of the cultivation, marketing and utilization of coconuts in India.

WHEREAS it is expedient to provide for the creation of a fund to be expended by a Committee specially constituted in this behalf for the improvement and development of the cultivation, marketing and utilization of coconuts in India ;

It is hereby enacted as follows :—

Notes. — This Act establishes an Indian Coconut Committee with an independent source of income, for the improvement and development of the growing, marketing and manufacture of the coconuts in India and for promoting and safeguarding the interests of all branches of its production and manufac-

ture from the producer to the consumer. Coir and coir manufactured goods are excluded from the purview of the committee in deference to the wishes of the Government of Travancore.

1. (1) This Act may be called the Indian Short title and ex- Coconut Committee Act, tent. 1944.

(2) It extends to the whole of British India.

2. In this Act, unless there is anything repugnant in the subject or Definitions. context,—

(a) "Collector" means, in reference to copra

consumed in a mill in British India, the Collector of the district in which the mill is situated or any other officer appointed by the Central Government to perform the duties of a Collector under this Act;

(b) "the Committee" means the Indian Coconut Committee constituted under this Act;

(c) "mill" means any place in which copra is crushed for the extraction of oil, which is a factory as defined in section 2 of the Indian Factories Act, 1934 (XXV of 1934);

(d) "prescribed" means prescribed by rules made under this Act.

3. There shall be levied and collected, as a *Imposition of co-* cess for the purposes of *conut cess.* this Act, on all copra consumed in any mill in British India, whether produced in or imported from outside British India, a duty of excise at such rate, not exceeding four annas per cwt., as the Central Government may, after consulting the Committee, by notification in the official Gazette, fix in this behalf.

4. As soon as may be after the commencement of this Act, the Central Government shall cause to be constituted a Committee consisting of the following members, to receive and expend the proceeds of the duty collected under this Act, namely:—

(a) the Vice-Chairman, Imperial Council of Agricultural Research;

(b) nine persons representing the growers of coconut in India, of whom two shall be nominated by the Government of Madras, two by the Government of the State of Travancore, and one each by the Government of Bombay, the Government of Bengal, the Government of Orissa, the Government of the State of Mysore, and the Government of the State of Cochin;

(c) five persons representing the coconut oil industry, nominated, respectively, by the Government of Madras, the Government of the State of Travancore, the Government of the State of Cochin, the Indian Merchants Association, Bombay, and the Bombay Chamber of Commerce, Bombay;

(d) three persons representing, respectively, the Provincial Government of Madras, the Government of the State of Mysore and the Government of the State of Travancore, appointed in each case by the Government concerned;

(e) one person nominated by the Travancore Chamber of Commerce;

(f) one person appointed by the Central Government;

(g) six other persons, of whom two shall be persons elected from among themselves by the elected members of the Legislative Assembly of the Central Legislature, one shall be a person elected from among themselves by the elected members of the Council of State, and three shall be persons nominated respectively by the Governments of the States of Travancore, Mysore and Cochin.

5. The Committee shall be a body corporate *Incorporation of* rate by the name of the *the Committee.* Indian Central Coconut Committee, having perpetual succession and a common seal with power to acquire and hold property, both moveable and immovable, and to contract, and shall by the said name sue and be sued.

6. (1) If within the period prescribed in this *Vacancies.* behalf, or within such further period as the Central Government may allow, any authority or body fails to make any nomination, election or appointment which it is entitled to make under section 4, the Central Government may itself appoint a member to fill the vacancy in the Committee.

(2) Where a member of the Committee dies, resigns or is removed, or ceases to reside in India, or becomes incapable of acting, the Central Government may, on the recommendation of the authority or body which was entitled to make the first nomination, election or appointment under section 4, or where such recommendation is not made within a reasonable time, then on its own initiative, appoint a person to fill the vacancy.

(3) No act done by the Committee shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of the Committee.

President of 7. (1) The Vice-Chair-
Committee, Secre- man, Imperial Council
tary, sub-committees of Agricultural Research,
and staff. shall be the President of
the Committee.

(2) The Central Government shall appoint a person to be the Secretary of the Committee and such person shall be paid by the Committee such salary and such allowances as may be fixed by the Central Government.

(3) The Committee may appoint such sub-committees and staff as may be necessary for the efficient performance of its functions under this Act.

8. The Central Government may, on the recommendation of the *Appointment of Officers.* Committee, appoint an officer or officers to discharge under the direction of the Committee such duties as may be prescribed, and such officer or officers shall be paid by the Committee such salary and allowances as may be fixed by the Central Government.

9. It shall be the duty of the Committee *Functions of the Committee.* to promote the improvement and development of the cultivation and marketing of coconuts and their utilization for the production of copra, coconut oil and coconut poonac and for such other purposes as the Committee may think fit —

(a) by undertaking, assisting or encouraging agricultural, industrial, technological and economic research ;

(b) by the supply of technical advice to growers ;

(c) by encouraging the adoption of improved methods of cultivation ;

(d) by carrying on such propaganda in the interest of the coconut industry as may be necessary ;

(e) by collecting statistics from growers, dealers, millers and other sources on all relevant matters bearing on the industry ;

(f) by fixing grade standards of copra and its products ;

(g) by recommending the maximum and minimum prices to be fixed for copra ;

(h) by advising on all matters which require attention for the development of the industry ;

(i) by improving the marketing of coconuts in India and abroad and suggesting suitable measures to prevent unfair competition; and

(j) by adopting any other measures or performing any other duties which it may be required by the Central Government to adopt or perform or which it may itself think necessary or advisable in order to carry out the purposes of this Act.

10. (1) The owner of every mill shall furnish to the Collector on *Delivery of monthly returns.* or before the 7th day of each month, a return stating the total amount of copra consumed in the mill during the preceding month together with such further information in regard thereto as may be prescribed :

Provided that no return shall be required in regard to copra consumed before the commencement of this Act.

(2) Every such return shall be made in such form and shall be verified in such manner as may be prescribed.

11. (1) On receiving any return made under *Collection of cess by Collector.* section 10 the Collector shall assess the amount of the duty payable under section 3 in respect of the period to which the return relates, and if the amount has not already been paid shall cause a notice to be served upon the owner of the mill requiring him to make payment of the amount assessed within thirty days of the service of the notice.

(2) If the owner of any mill fails to furnish in due time the return referred to in sub-section (1) of section 10 or furnishes a return which the Collector has reason to believe is incorrect or defective, the Collector shall assess the amount, if any, payable by him in such manner, as may be prescribed, and the provisions of sub-section (1) shall thereupon apply as if such assessment had been made on the basis of a return furnished by the owner :

Provided that, in the case of a return which he has reason to believe is incorrect or defective, the Collector shall not assess the duty at an amount higher than that at which it is assessable on the basis of the return without giving to the owner a reasonable opportunity of proving the correctness and completeness of the return.

(3) A notice under sub-section (1) may be served on the owner of a mill either by post or by delivering it or tendering it to the owner or his agent at the mill.

Finality of assessment and recovery of unpaid duty. **12.** (1) An assessment made in accordance with the provisions of section 11 shall not be questioned in any Court.

(2) Any owner of a mill who is aggrieved by an assessment made under section 11, may within three months of service of the notice referred to in sub-section (1) of that section, apply to the Central Government for the cancellation or modification of the assessment and, on such application, the Central Government may cancel or modify the assessment and order the refund to such owner of the whole or part, as the case may be, of any amount paid thereunder.

(3) Any sum recoverable under section 11 may be recovered as an arrear of land revenue.

13. (1) The Collector or any officer empowered by general or special order of the Central Government in this behalf shall have free *Power to inspect mills and take copies of records and accounts.*

access at all reasonable times during working hours to any mill or to any part of any mill.

(2) The Collector or any such officer may at any time, with or without notice to the owner, examine the working records, sale records and accounts of any mill and take copies of or extracts from all or any of the said records or accounts for the purpose of testing the accuracy of any return or of informing himself as to the particulars regarding which information is required for the purposes of this Act or any rules made thereunder.

(3) Where any officer other than the Collector proposes to examine under sub-section (2) any record or account containing the description or formulae of any trade process, the owner of the mill may give to the said officer for transmission to the Collector, a written notice of objection and the officer shall thereupon seal up the record or account pending the orders of the Collector.

14. (1) All such copies and extracts and all information acquired by a Collector or any other officer from an inspection of any mill or warehouse or from any return submitted under this Act shall be treated as confidential.

(2) If the Collector or any such officer discloses to any person other than a superior officer any such information as aforesaid without the previous sanction of the Central Government, he shall be punishable with imprisonment which may extend to six months and shall also be liable to fine :

Provided that nothing in this section shall apply to the disclosure of any such information for the purposes of a prosecution in respect of the making of a false return under this Act.

15. (1) On the last day of each month or as soon thereafter as may be convenient, the proceeds of the duty recovered during that month shall, after deduction of the expenses, if any, of collection and recovery, be paid to the Committee.

(2) Subject to such conditions as may be prescribed, the said proceeds and any other monies received by the Committee shall be applied to meeting the expenses of the Committee and the cost of such measures as it may subject to the control of the Central Government decide to undertake in the exercise of the functions specified in section 9.

16. (1) The Committee shall publish an annual report and shall keep accounts of all duty

received by it under this Act and of the manner in which it is expended and shall also publish a summary of the accounts along with the annual report.

(2) Such accounts shall be examined and audited annually in the prescribed manner, and the auditors shall have power to disallow any item which has been, in their opinion, expended otherwise than in pursuance of the purposes of this Act.

(3) If any item is disallowed, an appeal shall lie to the Central Government whose decision shall be final.

17. The Central Government may, by *Dissolution of Committee.* notification in the official Gazette, declare that, with effect from such date as may be specified in the notification, the Committee shall be dissolved, and on the making of such declaration all funds and other property vested in the Committee shall vest in His Majesty for the purposes of the Central Government and this Act shall be deemed to have been repealed.

Power of the Central Government to make rules. **18.** (1) The Central Government may make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) for prescribing the time within which nominations or elections shall be made under section 4 whether in the first instance or on the occurrence of vacancies ;

(b) for prescribing the term of office of the members of the Committee ;

(c) for prescribing the circumstances in which and the authority by which any member may be removed ;

(d) for prescribing the quorum of the Committee ;

(e) for the holding of a minimum number of meetings of the Committee during any year ;

(f) for the maintenance by the Committee of a record of all business transacted and the submission of copies of such records to the Central Government ;

(g) for the definition of the powers of the Committee to enter into contracts which shall be binding on the Committee, and the manner in which such contracts shall be executed ;

(h) for the regulation of the travelling allowances of members of the Committee and of their remuneration, if any ;

(i) for the definition of the powers of the Committee, in respect of the appointment,

promotion and dismissal of officers and servants of the Committee, and in respect of the creation and abolition of appointments of such officers or servants ;

(j) for the regulation of the grant of pay and leave to officers and servants of the Committee, and the payment of leave allowances to such officers and servants and the remuneration to be paid to any person appointed to act for any officer or servant to whom leave is granted ;

(k) for the regulation of the payment of pensions, gratuities, compassionate allowances and travelling allowances to officers and servants of the Committee ;

(l) for prescribing the establishment and maintenance of a provident fund for the officers and servants of the Committee, and for the deduction of subscriptions to such provident fund from the pay and allowances of such officers and servants, other than Government servants whose services have been lent or transferred to the Committee ;

(m) for prescribing the preparation of budget estimates of the annual receipts and expenditure of the Committee and of supplementary estimates of expenditure not included in the budget estimates, and the manner in which such estimates shall be sanctioned and published ;

(n) for defining the powers of the Committee, the Standing Finance Sub-Committee, if any, and the President, respectively, in regard to the expenditure of the funds of the Committee, whether provision has or has not been made in the budget estimates or by re-appropriation for such expenditure, and in regard to the re-appropriation of estimated savings in the budget estimates of expenditure ;

(o) for prescribing the maintenance of accounts of the receipts and expenditure of the Committee and providing for the audit of such accounts ;

(p) for prescribing the manner in which payments are to be made by or on behalf of the Committee, and the officers by whom orders for making deposits or investments or for withdrawals or disposal of the funds of the Committee shall be signed ;

(q) for determining the custody in which the current account of the Committee shall be kept, and the bank or banks at which surplus monies at the credit of the Committee

may be deposited at interest, and the conditions on which such monies may be otherwise invested ;

(r) for prescribing the preparation of a statement showing the sums allotted to Departments of Agriculture or institutions not under the direct control of the Committee for expenditure on research, the actual expenditure incurred, the outstanding liabilities, if any, and the disposal of unexpended balances at the end of the year ;

(s) for prescribing the duties of the officers appointed under section 8, and the powers and duties of the Secretary of the Committee ;

(t) any other matter which is to be or may be prescribed.

19. The Committee may, with the previous sanction of the Central Government, make regulations consistent with this Act and with any rules made under section 18 to provide for all or any of the following matters, namely :—

(a) the appointment of a Standing Finance Sub-Committee or other Sub-Committee and the delegation thereto of any powers exercisable under this Act by the Committee ;

(b) the method of appointment, removal and replacement and the term of office of members of the Sub-Committees, and for the filling of vacancies therein.

(c) the dates, times and places for meetings of the Committee and the Sub-Committees and the procedure to be observed at such meetings ;

(d) the circumstances in which security may be demanded from officers and servants of the Committee, and the amount and nature of such security in each case ;

(e) the times at which, and the circumstances in which, payments may be made out of the provident fund and the conditions on which such payments shall relieve the fund from further liability ;

(f) the contribution, if any payable from the funds of the Committee to the provident fund ;

(g) generally all matters incidental to the provident fund and the investment thereof.

20. All rules made under section 18 and all regulations made under section 19 shall be published in the *Gazette of India*.

Indian Income-tax (Amendment) Act, 1944.

[Recd. G. G.'s assent on 12th April 1944.]

An Act further to amend the Indian Income-tax Act, 1922.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922 (XI of 1922), for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Income-tax (Amendment) Act, 1944.

2. In sub-section (1) of section 7 of the Indian *Amendment of* Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the said Act), in *Explanation 2*, the words "at or in connexion with the termination of his employment, whether or not the employment is then terminated or to be terminated," shall be omitted.

3. In sub-section (1) of section 14 of the *Amendment of* said Act, after the words *section 14, Act XI of 1922.* "Hindu undivided family" the following words shall be added, namely :—

"where such sum has been paid out of the income of the family."

4. After sub-section (2) of section 15 of the said Act, the following sub-section shall be inserted, namely :—

"(2A) Nothing in sub-section (1) or sub-section (2) shall apply to so much of any premium or other payment made on a policy other than a contract for a deferred annuity as is in excess of ten per cent. of the actual capital sum assured; and in calculating any such capital sum no account shall be taken of the value of any premiums agreed to be returned or of any benefit by way of bonus or otherwise which is to be or may be received either before or after death either by the person paying the premium or by any other person and which is not the sum actually assured."

Notes.—The provisions contained in the new sub-section (2A) of S. 15 will now put a stop to a tax-evasion device which mainly took the form of a one year policy. The provision is akin to the United Kingdom Law.

Insertion of new section 18A in Act XI of 1922. 5. After section 18 of the said Act, the following section shall be inserted, namely :—

"18A. (1) (a) In the case of income in *Advance payment of tax.* respect of which provision is not made under

section 18 for deduction of income-tax at the time of payment, the Income-tax Officer may, on or after the 1st day of April in any financial year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December and 15th day of March in that year, respectively, an amount equal to one-quarter of the income-tax and super-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed, if that total income exceeded six thousand rupees. Such income-tax and super-tax shall be calculated at the rates in force for the financial year in which he is required to pay the tax, and shall bear to the total amount of income-tax and super-tax so calculated on the said total income the same proportion as the amount of such inclusions bears to his total income or, in cases where under the provisions of sub-section (1) of section 17 both income-tax and super-tax or super-tax are chargeable with reference to the total world income, shall bear to the total amount of income-tax and super-tax which would have been payable on his total world income of the said previous year had it been his total income the same proportion as the amount of such inclusions bears to his total world income :

Provided that, where the previous year of the assessee in respect of any source of income ends after the 31st day of December and before the 30th day of April, the order in writing issued by the Income-tax Officer requiring the payment of income-tax and super-tax on that source of income shall substitute for the four quarterly payments hereinbefore specified, three payments of equal amount to be made on the 15th day of September, the 15th day of December and the 15th day of March, respectively :

Provided further that, if the assessee is a partner of a registered firm and an assessment of the firm has been completed for a previous year later than that for which the assessee's last assessment has been completed, his share in the profits of the firm shall, for the purposes of this sub-section, be included in his total income on the basis of the latest assessment of the firm :

Provided further that, if after the making of an order by the Income-tax Officer and

before the 15th day of February of the financial year an assessment of the assessee or of the registered firm of which he is a partner is completed in respect of a previous year later than that referred to in the order of the Income-tax Officer, the Income-tax Officer may make an amended order requiring the assessee to pay in one instalment on the specified date, or in equal instalments on the specified dates if more than one, falling after the date of the amended order, the tax computed on the revised basis as reduced by the amount, if any, paid in accordance with the original order; but if the amount already paid exceeds the tax determined on the revised basis, the excess shall be refunded.

(b) If the notice of demand issued under section 29 in pursuance of the order under clause (a) of this sub-section is served after any of the dates on which the instalments specified therein are payable, the tax shall be payable in equal instalments on each of such of those dates as fall after the date of the service of the notice of demand, or in one sum on the 15th day of March if the notice is served after the 15th day of December.

(2) If any assessee who is required to pay tax by an order under sub-section (1) estimates at any time before the last instalment is due that the part of his income to which that sub-section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay an amount less than the amount which he is so required to pay, he may send to the Income-tax Officer an estimate of the tax payable by him calculated in the manner laid down in sub-section (1) on that part of his income for such period, and shall pay such amount as accords with his estimate in equal instalments on such of the dates specified in sub-section (1) (a) as have not expired or in one sum if only the last of such dates has not expired :

Provided that the assessee may send a revised estimate of the tax payable by him before any one of the dates specified in sub-section (1) (a) and adjust any excess or deficiency in respect of any instalment already paid in a subsequent instalment or in subsequent instalments.

(3) Any person who has not hitherto been assessed shall, before the 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed six thousand rupees, send to the Income-tax Officer an

estimate of the tax payable by him on that part of his income to which the provisions of section 18 do not apply of the said previous year calculated in the manner laid down in sub-section (1), and shall pay the amount, on such of the dates specified in that sub-section as have not expired, by instalments which may be revised according to the proviso to sub-section (2).

(4) Where part of the income to which sub-section (1), (2) or (3) applies consists of any income of the nature of commission which is receivable periodically and is not received or adjusted by the payer in the assessee's account before any of the quarterly instalments of tax become due, he may defer payment of tax on that part of his income to the date on which such income would be normally received or adjusted and if he does so he shall communicate to the Income-tax Officer the date to which such payment is deferred :

Provided that, if the tax of which the payment is deferred is not paid within fifteen days of the date on which such income or part thereof is received or adjusted by the payer in the assessee's account, the tax shall be payable with six per cent. simple interest per annum from the date of such receipt or adjustment to the date of payment of the tax.

(5) The Central Government shall pay on any amount paid under this section simple interest at two per cent. per annum from the date of payment to the date of the assessment (hereinafter called the 'regular assessment') made under section 23 of the income, profits and gains of the previous year for an assessment for the year next following the year in which the amount was payable :

Provided that on any portion of such amount which is refunded under the foregoing provisions of this section interest shall be payable only up to the date on which the refund was made.

(6) Where in any year an assessee has paid tax under sub-section (2) or sub-section (3) on the basis of his own estimate, and the tax so paid is less than eighty per cent. of the tax determined on the basis of the regular assessment, so far as such tax relates to income to which the provisions of section 18 do not apply and so far as it is not due to variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made, simple interest at the rate of six per cent. per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the asses-

see upon the amount by which the tax so paid falls short of the said eighty per cent. :

Provided that, where, as a result of an appeal under section 31 or section 33 or of a revision under section 33A or of a reference to the High Court under section 66, the amount on which interest was payable under this sub-section has been reduced the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded together with the amount of income-tax that is refundable:

Provided further that, where a business, profession or vocation is newly set up and is assessable on the income, profits and gains of its first previous year in the financial year following that in which it is set up, the interest payable shall be computed from the 1st day of April of the said financial year.

(7) Where, on making the regular assessment, the Income-tax Officer finds that any assessee has—

(a) under sub-section (2) or sub-section (3) underestimated the tax payable by him and thereby reduced the amount payable in any of the first three instalments, or

(b) under sub-section (4) wrongly deferred the payment of tax on a part of his income, he may direct that the assessee shall pay simple interest at six per cent. per annum, in the case referred to in clause (a) for the period during which the payment was deficient on the difference between the amount paid in each such instalment and the amount which should have been paid having regard to the aggregate tax actually paid under this section during the year, and in the case referred to in clause (b) for the period during which the payment of tax was wrongly deferred on the amount of which the payment was so deferred :

Provided that for the purposes of this sub-section any instalment due before the expiry of six months from the commencement of the previous year in respect of which it is to be paid shall be deemed to have become due fifteen days after the expiry of the said six months.

(8) Where, on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment.

(9) If the Income-tax Officer, in the course of any proceedings in connection with the regular assessment, is satisfied that any assessee—

(a) has furnished under sub-section (2) or sub-section (3) estimates of the tax payable by him which he knew or had reason to believe to be untrue, or

(b) has without reasonable cause failed to comply with the provisions of sub-section (3), the assessee shall be deemed, in the case referred to in clause (a), to have deliberately furnished inaccurate particulars of his income, and in the case referred to in clause (b), to have failed to furnish the return of his total income; and the provisions of section 28, so far as may be, shall apply accordingly :

Provided that the amount of penalty leviable shall, in the case referred to in clause (a), be a sum not exceeding one-and-a-half times the amount by which the tax actually paid during the year under the provisions of this section falls short of the tax that should have been paid by the assessee under sub-section (1) or eighty per cent. of the tax determined on the basis of the regular assessment as modified in the manner provided in sub-section (6), whichever is the less, and, in the case referred to in clause (b), one-and-a-half times the said eighty per cent.

(10) (a) If any assessee does not pay on the specified dates any instalment of tax that he is required to pay under sub-section (1) and does not, before the date on which any such instalment as is not paid becomes due, send under sub-section (2) an estimate or a revised estimate of the tax payable by him, he shall be deemed to be an assessee in default in respect of such instalment or instalments.

(b) If any assessee has sent under sub-section (2) or sub-section (3) an estimate or a revised estimate of the tax payable by him, but does not pay any instalment in accordance therewith on the date or dates specified in sub-section (1), he shall be deemed to be an assessee in default in respect of such instalment or instalments :

Provided that the assessee shall not, under clause (a) or (b), be deemed to be in default in respect of any amount of which the payment is deferred under sub-section (4) until after the date communicated by him to the Income-tax Officer under that sub-section.

(11) Any sum other than a penalty or interest paid by or recovered from an assessee in pursuance of the provisions of this section shall be treated as a payment of tax in respect of the income of the period which would be the previous year for an assessment for the financial year next following the year in which it was payable, and credit therefor

shall be given to the assessee in the regular assessment."

Notes.—The new section 18A makes provision for advance payments of tax on income which is not liable to deduction of tax at source under section 18 of the Act. The scope of the new section is confined to those persons whose incomes as last ascertained exceeded Rs. 6000 or are likely to exceed Rs. 6000. The scheme for quarterly advance payments of tax contained in the new section is based on an option given to the assessee to pay tax either on his last assessed income or on his own estimate.

Amendment of section 24, Act XI of 1922.

6. In section 24 of the said Act,—

(a) in sub-section (1), in the existing proviso, after the word "Provided" the word "further" shall be inserted, and before that proviso the following proviso shall be inserted, namely:—

"Provided that, where the loss sustained is a loss of profits or gains which would but for the loss have accrued or arisen within an Indian State and would, under the provisions of clause (c) of sub-section (2) of section 14, have been exempt from tax, such loss shall not be set off except against profits or gains accruing or arising within an Indian State and exempt from tax under the said provisions:"

(b) in sub-section (2), in the proviso, clauses (a), (b), (c) and (d) shall be relettered as clauses (b), (c), (d) and (e), respectively, and the following shall be inserted as clause (a), namely:—

"(a) where the loss sustained is a loss of profits and gains of a business, profession or vocation to which the first proviso to sub-section (1) is applicable, and the profits and gains of that business, profession or vocation are, under the provisions of clause (c) of sub-section (2) of section 14, exempt from tax, such loss shall not be set off except against profits and gains accruing or arising in an Indian State from the same business, profession or vocation and exempt from tax under the said provisions;"

7. In sub-section (1) of section 25 of the said Act, for the words *Amendment of section 25, Act XI of 1922.* and figures "on which income-tax was not at any time charged under the provisions of the Indian Income-tax Act, 1918," the words, brackets and figure "to which sub-section (3) is not applicable" shall be substituted.

8. In section 29 of the said Act, for the words *Amendment of section 29, Act XI of 1922.* "tax or penalty," in both places where they occur, the words "tax, penalty or interest" shall be substituted.

Amendment of section 30, Act XI of 1922.

9. In section 30 of the said Act,—

(a) in sub-section (1), for the words, figures and letter "or objecting to a refusal of an Income-tax Officer to register a firm under section 26A" the following shall be substituted, namely:—

"or objecting to the cancellation by an Income-tax Officer of the registration of a firm under sub-section (4) of section 23 or to a refusal to register a firm under sub-section (4) of section 23 or section 26A";

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) Any person having, in accordance with the provisions of sub-section (3A), (3B) or (3C) of section 18, read with sub-section (6) of that section, deducted and paid tax in respect of any sum chargeable under this Act other than interest who denies his liability to make such deduction may appeal to the Appellate Assistant Commissioner to be declared not liable to make such deduction.";

(c) in sub-section (2), after the words "thirty days" the following shall be inserted, namely:—

"of the payment of the tax deducted under sub-section (3A), (3B) or (3C) of section 18 or".

Amendment of section 31, Act XI of 1922.

10. In sub-section (3) of section 31 of the said Act,—

(a) for the words, figures and letter "or, in the case of an order refusing to register a firm under section 26A", occurring after clause (b), the following shall be substituted, namely:—

"or, in the case of an order cancelling the registration of a firm under sub-section (4) of section 28 or refusing to register a firm under sub-section (4) of section 23 or section 26A";

(b) after clause (g) and before the first proviso, the following shall be inserted, namely:—

"or, in the case of an appeal under sub-section (1A) of section 30,

(h) decide that the person is or is not liable to make the deduction and in the latter case direct the refund of the sum paid under sub-section (6) of section 18:—"

Notes.—Sections 30 and 31 of the Income-tax Act as amended by Ss. 9 and 10 of this Act now provide for a right of appeal against a refusal or cancellation of registration under S. 23 (4) of the main Act and also in the case of a person denying his liability to deduct tax under the provisions of S. 18 (3A), (3B) or (3C).

11. In section 33 of the said Act, sub-section (5) shall be re-numbered as sub-section (6) and the following sub-section shall be inserted as sub-section (5), namely :—

“(5) Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made, the Appellate Tribunal may authorise the Income-tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association.”

12. In section 47 of the said Act, after the words, brackets and figures “or sub-section (1) of section 46” the following shall be inserted namely :—

“and any interest payable under the provisions of sub-section (4), (6), (7) or (8) of section 18A”.

13. In section 56 of the said Act, before the words “Subject to the provisions of this Chapter” the words, brackets, letter and figures, “Except in cases to which by clause (a) of the proviso to sub-sections (3) and (4) of section 25 those sub-sections do not apply and” shall be inserted.

Notes. — The amendment of S. 56 now prevents the proviso of sub-sections (3) and (4) of S. 25 from being nullified by the provision in S. 56 that the total

income for the purposes of super-tax shall be the total income as assessed for the purposes of income-tax.

Amendment of the Schedule to Act XI of 1922.

14. In the Schedule to the said Act,—

(a) in the proviso to rule 2,—

(i) in clause (b), for the word “received,” where it occurs for the second time, the word “payable” shall be substituted;

(ii) for clause (c) the following clauses shall be substituted, namely :—

“(c) 90 per cent. of the first year’s premiums received during the preceding year in respect of all other life insurance policies, *plus*

(d) 12 per cent. of all renewal premiums received during the preceding year.”

(b) in rule 3 for clause (c) the following clause shall be substituted, namely :—

“(c) interest received in respect of any securities of the Central Government which have been issued or declared to be income-tax free shall not be excluded but the whole amount of such interest received during the inter-valuation period shall be exempt from income-tax under the second proviso to section 8 though not from super-tax”;

(c) in rule 5,—

(i) in clause (ii), after the words “but excludes profits on the realization of securities” the words “or other assets” shall be added ;

(ii) in clause (iii) after the words “and losses on the realization of, securities” the words “or other assets” shall be inserted.

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	48	C W N	273		1944 AWR PC	28			71	I A	7		71	I A	25
	1944 M W N	299			ILR 1944 KPC	57			10	B R	539		1944-1 M L J	474	
	212	I C	1	18	212	I C	117		1944 Pesh LJPC	27			213	I C	144
	71	I A	1		10	B R	491	29	48	C W N	443		10	B R	571

AIR 1944 Privy Council			AIR 1944 Privy Council			AIR 1944 Privy Council			AIR 1944 Privy Council		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
33con	ILR 1944 A	191	54con	57 M L W	374	73con	1944-1 M L J	520	85con	1944 M W N	720
35	1944 A L J	162		1944-1 M L J	515		57 M L W	408		1944 O W N	495
	48 C W N	439		1944 M W N	440		1944 M W N	502		71 I A	153
	71 I A	56		10 B R	667		71 I A	75	87	48 C W N	823
	213 I C	342		214 I C	1		1944 A L J	385		71 I A	149
	1944 O W N	331		71 I A	83		215 I C	63		1944-2 M L J	347
	10 B R	644		1944 A L J	388		11 B R	94		47 P L R	24
	1944 AWRPC	33		45 Cr L J	721		46 B L R	838		216 I C	178
	19 Luck	309		46 B L R	844		1944 AWRPC	38		11 B R	137
39	48 C W N	448		1944 AWRPC	40		46 Cr L J	119	88	1944-2 M L J	310
	1944 A L J	172	58	48 C W N	810	76	48 C W N	590		49 C W N	1
	212 I C	433		71 I A	124		1944-2 M L J	17		1944 M W N	656
	71 I A	47		1944-2 M L J	275		1944 A L J	395		1944-12 ITR	482
	1944-1 M L J	466		57 M L W	571		71 I A	106		71 I A	159
	10 B R	566	65	48 C W N	820		1944 M W N	561	93	1944 A L J	392
	57 M L W	401		1944 A L J	382		57 M L W	520		57 M L W	523
	1944 M W N	450		71 I A	142		1944 AWRPC	46		1944 AWRPC	48
	46 B L R	518		1944-2 M L J	218		46 B L R	841		1944 M W N	680
	1944 AWRPC	36		57 M L W	516		ILR 1944 B	469		216 I C	19
42	48 C W N	410		46 B L R	849		216 I C	169		1944-2 M L J	252
	71 I A	31		1944 AWRPC	51	78	11 B R	133		46 Cr L J	105
	1944-1 M L J	528	67	48 C W N	585		48 C W N	621	96	1944 M W N	689
	1944 M W N	459		1944-2 M L J	20		1944-2 M L J	29		49 C W N	75
	213 I C	257		1944 M W N	467		57 M L W	425		1944-2 M L J	343
	10 B R	609		71 I A	93		1944 M W N	567		47 P L R	30
46	71 I A	65		1944 A L J	404	80	ILR 1944 M	617		11 Cut L T	1
	48 C W N	435		1944 AWRPC	42	83	...		100	1944 M W N	661
	1944-1 M L J	523		46 B L R	865		1944 A L J	384		57 M L W	608
	57 M L W	378		216 I C	53		57 M L W	518		1944-2 M L J	354
	1944 M W N	455		11 B R	124		1944-2 M L J	227		49 C W N	52
	ILR 1944 N	597	71	48 C W N	618		1944 AWRPC	47		1944 A L J	513
	214 I C	150		1944-2 M L J	25		11 B R	119		1944 PeshLJPC	29
	11 B R	14		57 M L W	422	85	215 I C	316		47 P L R	20
50	215 I C	1		71 I A	113		48 C W N	830		71 I A	171
	11 B R	81		1944 M W N	564		57 M L W	565		216 I C	262
54	48 C W N	477	73	48 C W N	493		1944-2 M L J	330		11 B R	162
							1944 A L J	463			

CASES OVERRULED & REVERSED

IN

A. I. R. (31) 1944 PRIVY COUNCIL

Bank of Baroda Ltd. v. Punjab National Bank Ltd., (42) 46 C. W. N. 645 = 29 A. I. R. 1942 Cal. 562 = 203 I. C. 207	Reversed in A. I. R. (31) 1944 P. C. 58
Bhugwat Sahay v. Pashupati Nath Bose, ('06) 10 C. W. N. 564	Impliedly Overruled in A.I.R. (31) 1944 P. C. 65.
Faiyaz Hussain v. Municipal Board, Amroha, ('39) I. L. R. 1939 All. 237=1939 A.L.J. 19 = 1939 A. W. R. 131=26 A. I. R. 1939 All. 280=181 I. C. 964	Reversed in A. I. R. (31) 1944 P. C. 33.
Mahomed Asghar v. Abida Begam, ('33) 54 All 858 =1932 A.L.J. 730=20 A.I.R. 1933 All. 177 = 138 I. C. 670	Impliedly Overruled in A. I. R. (31) 1944 P. C. 65.
Raghuraj Singh v. Hari Kishen Lal, ('38) 14 Luck 13=1938 O.W.N. 331=1938 A.W.R. 26=1938 O.L.R. 143=1938 R. D. 405=25 A. I. R. 1938 Oudh 107=173 I. C. 865	Reversed in A. I. R. (31) 1944 P. C. 35.

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Privy Council

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(From Patna)

5th August 1943

LORDS ATKIN, THANKERTON, PORTER
AND CLAUSON AND SIR GEORGE RANKIN

Raja Braja Sunder Deb and others —
Appellants

v.

Bamdeb Das alias Pattanaik and others
— Respondents.

Privy Council Appeal No. 20 of 1941 ; Patna
Appeal No. 17 of 1940.

(a) Malicious prosecution — Suit for — Person noted as accused in charge sheet but not sent up for trial has no cause of action.

A person who was noted in the charge sheet in a criminal prosecution as an accused person not sent up for trial and was in fact never so sent up cannot be said to have been prosecuted and therefore has no cause of action to maintain an action for damages for malicious prosecution. [P 3f,g]

(b) Malicious prosecution—Suit for—Essentials to be proved by plaintiff indicated—Prosecution is not malicious merely because it is inspired by anger.

In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things : (1) that defendant was malicious and (2) that he acted without reasonable and probable cause. Malice has been said to mean any wrong or indirect motive, but a prosecution is not malicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be initiator of a malicious prosecution. But malice alone is not enough : there must also be shown to be absence of reasonable and probable cause. [P 4d]

Sir T. Strangman and C. Bagram —
for Appellants.

W. Wallach — for Respondents.

Lord Porter. — This appeal by special leave from the High Court of Patna dated 25th January 1938, raises the question whether

the appellants who were plaintiffs in the original suit are entitled to succeed in an action against the defendants for malicious prosecution. Plaintiff 1 is the Raja of Aul, once an independent tributary State in Orissa, but now an ordinary zemindari subject to the laws of British India. He is a Khetriya by caste. Appellant 2 is the son of the original plaintiff 2, Krishna Chandra Jagati, deceased, and has been duly substituted for him in the proceedings. Both the original plaintiffs 2 and 3 were servants of plaintiff 1. Respondents 1 and 2 are the sons and legal personal representatives of the original defendant 1, Bamdeb Das, alias Patnaik, who was the father of one Jugal Kishori Das and was related to one Harikrishna Mahanty, now deceased. Defendant 2 is a nephew of defendant 3, who was a cousin of Harikrishna Mahanty. These two defendants formed a joint Hindu family. The defendants and Harikrishna Mahanty were Karans by caste, a caste regarded as of inferior status to that of plaintiff 1. The original defendants are said to have prosecuted the original plaintiffs maliciously in the following circumstances.

On 18th September 1926, Kanaka, the elder daughter of Harikrishna, was with the consent of her father taken to the household of appellant 1, it was said, by the respondents, in order to become his concubine, but, by the appellants, in order to make a subordinate form of marriage which would give her the status of what is called a Chauki Bai, a position which may perhaps be described as that of a secondary wife. There is no doubt that the other two original plaintiffs were implicated in the removal and no argument to the contrary has been addressed to their Lordships. That some such status as Chauki Bai may

exist appears from a publication called Pachis Sawal, which contains 25 questions addressed to the Rajas and Chiefs of the Regulation and Tributary Mahals by the Superintendent in 1814 and was published under the authority of Government. Two of these questions may be quoted :

Question 2— By what titles are the several Ranis distinguished ?

Answer— First married is entitled the Pat Mahadae and the rest Mahadae. Besides such those of other castes, kept as Phool Bahees, are entitled "Ranee."

Question 10— On the death of the Raja, suppose he leaves no son born of any of his Ranees but leave a brother(s) and sons by his Phool Beebahis and concubines and suppose the Ranees have not become "Sutees," who in such a case would succeed ?

Answer — The son born of the Phool Beebahi becomes the Raja."

This book has previously been received in evidence by their Lordships. In any case apart from it there is a considerable body of evidence to the effect that the Rajas of Aul were accustomed to take to themselves subordinate wives and without determining the question their Lordships are prepared to decide the present case on the assumption that the Rajas are entitled by custom to take such wives.

On the evening on which his daughter was taken away Harikrishna Mahanty appears to have given a caste feast accompanied by various ceremonies such as might indicate that his daughter was to be taken to the Rajah's palace in order to become a Chauki Bai, and after the feast was over she was carried to the palace in a palanquin accompanied by her brother and the village barber. Moreover the feast was attended by a considerable number of the Karan caste including defendants 1 and 3 though these latter explain their presence by saying that they feared the enmity of the Raja if they stayed away. These circumstances are urged by the appellants as showing that the girl was being given in marriage and not in concubinage, since it is said that if the latter had been intended it would have been an occasion for sorrow and not for feasting and in any case members of her caste would not have attended. When they reached the palace the barber and the palanquin bearers remained outside, whilst the girl was taken within, and next morning they returned to their own village. Shamsunder Mahanty, the girl's brother, also remained outside and stayed after the barber had left but he was not called as witness and it does not appear that he ever saw his sister again. In October 1926, about a month after the girl reached the place she became ill and died. It is alleged

that the doctor who attended her diagnosed her illness as dropsy possibly caused by an attack of malarial fever, but he was not called to give evidence to this effect at the trial, though he was called at the criminal prosecution. During this period she appears to have remained in the harem, but no marriage ceremony took place.

In these circumstances, her taking away, illness and death not unnaturally caused considerable commotion amongst those of her own caste, commotion which was accentuated when it was rumoured that Harikrishna was about to send her younger sister to the palace. At any rate it is not surprising that in March 1927, a meeting was held amongst the Karans, the summons to which was sent out under the signatures of defendant 2 and Jugal Kishore, son of defendant 1. The subject for discussion was "ascertainment of social degeneration of the Karans of this part and the remedy therefor." At this meeting it appears from the programme which was produced in evidence that one subject raised was "reform of the hateful practice prevailing at this place," and it was given in evidence that it was proposed to ostracise Harikrishna for sending his daughter to the Raja. He was not in fact ostracised, 25 voting in his favour and 23 against. He says that the reason for this result was that the custom of secondary marriage was recognised, that he asked pardon and was excused. The fact is undeniable but the exact cause of the result is not directly material.

The next step which led up to the present action was taken by Jugal Kishore Das. In April 1927, a police inspector went to the neighbourhood in connexion with a petition case in which Jugal Kishore Das was concerned. In the course of his examination by the inspector he made a statement implicating the three appellants and Harikrishna, and of his own accord lodged a first information report on 20th April accusing them of selling and buying minor girls for the purpose of illicit intercourse. Jugal Kishore Das is dead, but it is alleged that Bamdeb Das and defendants 2 and 3 instigated the prosecution and instructed the police and therefore were the real prosecutors. There is evidence to support this allegation though the testimony of the defendants and the general effect of that of the police is against this contention, but the Judge of first instance found it established and their Lordships propose to deal with the case on the assumption that his finding is right. As a result of the allegations contained in the first information report, a charge sheet was prepared dated 20th May 1927. In it appellant 1 was

^a noted as an accused person not sent up for trial and in fact he never was so sent up. Appellants 2 and 3 and Harikrishna were sent for trial, the latter under S. 372, Penal Code, (selling or letting to hire of any person under 18 years of age with intent that such person shall be employed or used for prostitution or illicit intercourse or any unlawful or immoral purpose) and the other two under S. 373, Penal Code, read with S. 114, Penal Code, (buying, hiring or obtaining any person under 18 years of age with the like intent). For the purpose of these sections, illicit intercourse is defined to mean

^b "sexual intercourse between persons not united by marriage or by any union or tie which though not amounting to a marriage is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities as constituting between them a quasi-marital relation."

As a result of this information appellants 2 and 3 were criminally prosecuted. The hearing of this case took place before Mr. B. Misra and was protracted over the space of about a year. Some 14 witnesses were called on behalf of the prosecution, and after hearing the evidence the learned Magistrate dismissed the case without calling upon the accused persons, and found: (1) That the age of the girl was between 13 or 14. (2) That a sum of Rs. 500 was paid for the girl. (3) That the girl was given to appellant 1. (4) That she was given as a Chauki Bai and that upon the evidence contained in the Pachis Sawal and elicited from the witnesses such a union is at least a recognised tie. The witnesses were examined and cross-examined at length and inasmuch as the depositions were put in evidence in the present case their Lordships will refer to them in considering the findings at which the Subordinate Judge and the High Court have arrived. After this decision Harikrishna ^d took no further step but on 10th June 1929, the appellants instituted the present suit in the Court of the Subordinate Judge of Cuttack alleging that the original defendants in collusion with one another lodged a criminal information through Jugal Kishore falsely and maliciously implicating the appellants and were the real prosecutors. The learned Subordinate Judge found these charges proved and gave Rs. 6000, as damages divisible as to appellant 1 into a sum of Rs. 2000 for pain and suffering and Rs. 1000 for costs and as to each of the other two into Rs. 500 for pain and suffering and Rs. 1000 for costs. This finding was reversed by the High Court in a judgment obviously influenced by a strong dislike of the quasi-marriage spoken to, and animadverting in

very strong terms upon the honesty and capability of the learned Magistrate and the learned Subordinate Judge.

Whilst their Lordships agree with the conclusion reached by the High Court they must not be thought to agree with these observations. The learned Magistrate appears to them to have given a careful and dispassionate consideration to the matter and to have arrived at a reasonable and they think a justifiable solution. Furthermore whilst they differ sharply in many respects from the conclusions of the learned Subordinate Judge, they see no reason to cast aspersions upon his efforts. Their Lordships will consider his more detailed findings at a later stage, but before they do so there is one problem which requires immediate solution, viz.:—Has the Rajah of Aul any cause of action for malicious prosecution? In their Lordships' view clearly he has not: the simple answer is that he was never prosecuted. Their Lordships find themselves in entire agreement with the observations of Harries C. J. spoken when rejecting the appellant's petition for leave to appeal to His Majesty in Council:

"In my view it is clear that the Raja of Aul had no cause of action for malicious prosecution. He was never in fact prosecuted though the information ^g originally laid did suggest he was to a large extent responsible for the purchase of this girl. Be that as it may, it is clear that no criminal proceedings were ever taken against him, and that being so he could never maintain an action for damages for malicious prosecution."

As regards the other two appellants the learned Subordinate Judge made certain findings which must now be considered: (1) It was alleged by the prosecution that when she was sent to Aul the girl was between 12 and 13 years of age. The learned Subordinate Judge found that there was no satisfactory and reliable evidence of this allegation. The exact age however is immaterial provided she was ^h under 18 years of age. As to this there is ample evidence. Even the appellants' witnesses do not put her age more definitely than 17 or 18, whilst the doctor and the defendants' witnesses, some of whom were her contemporaries or nearly her contemporaries, put her age at not more than 13 or 14. This evidence commended itself to the learned Magistrate and their Lordships agree with his finding. They would add that there is evidence that one of the respondents' witnesses at the criminal trial obtained a copy of this girl's horoscope and handed it to the police, but that the original was with Harikrishna. The production of the original document would have set the matter at rest but in any case it has to be

a remembered that the question is not whether the girl was over 18 but whether the respondents reasonably thought she was younger. If the father had, and did not produce, so vital a document, they might well believe the girl was much under the prescribed age. Even if it were incumbent upon the respondents to prove that she was in fact under 18, their Lordships think sufficient proof was given, especially when it is remembered that, if she was not, the whole case breaks down, and yet in an application by the respondents in the criminal proceedings for transfer of the case to another Magistrate it is said only "that
b the defence of the petitioners is that the girl in question was taken for marriage in Ful Bebah form" (ii) The learned Subordinate Judge further finds no money was ever paid. As in the case of the previous finding, such a contention, if established, would be fatal to the prosecution. Yet it was never mentioned in the petition referred to above. Nor, indeed, was it seriously contested in the criminal proceedings. It is true that the appellants were not called upon to give evidence, but they cross-examined the prosecution's witnesses at length and as the learned Magistrate says, the fact was not categorically denied.

c From an examination of the record in the criminal proceedings the witnesses never seem to have been specifically challenged on the matter. It was not until the civil proceedings were heard that it was asserted that no money passed. There is plenty of evidence on behalf of the respondents that it did, and their Lordships again find themselves in agreement with the learned Magistrate. Even if they did not it would be enough if in this matter, as in point (i), the respondents honestly believed the girl was bought. Finally there is the substantial question whether the respondents had reasonable and probable cause for believing
d that the girl was given in order to become a concubine and not for some quasi-marital relationship and whether they were malicious. In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things : (i) that defendant was malicious and (ii) that he acted without reasonable and probable cause. Malice has been said to mean any wrong or indirect motive, but a prosecution is not malicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the initiator of a malicious prosecution. But malice alone is not enough : there must also be shown to be absence of reasonable and pro-

bable cause. If, in the present case, the respondents honestly believed a criminal offence to have been committed and had reasonable cause for so doing, they are not liable in this action, and even though they were malicious they still would not be liable if they had reasonable and probable cause for believing in the appellants' guilt.

In the present case, as in most cases, the two questions are interwoven, but for the sake of simplification their Lordships are prepared to assume without determining that the respondents were prepared to take the opportunity afforded them of making a general attack upon the type of subordinate marriage, which was said to have been intended and to have taken advantage of Harikrishna's action in order to do so. But they may nevertheless have then honestly believed that a criminal offence had been committed and have undertaken the prosecution in that belief. Let it be assumed that at the time when the girl was given away the respondents knew of the claim of the Rajas of Aul that they were entitled by custom to unite themselves with Karans by the method of Ful Bebah marriage and thereby to give the girl so united to them the status of a Chauki Bai. Still the question arises, had they at the time of the institution of the prosecution good
g reasons for believing that Kanaka was taken as a concubine and not under this custom. If the question was whether on the occasion of the feast when the girl was actually removed, the respondents had reasonable cause for this belief the matter might be one of doubt. But those are not the circumstances. The girl was taken away and lived in the Raja's harem for a month, but no ceremony was performed. She died in unusual circumstances and if the respondents really were prosecutors they must have known of the statement given by the Raja to the police before the prosecution took place : a statement which was given in evi-
h dence and contained the following assertions. He (i. e., the Raja) said that this girl was brought by her father and left in his palace to be used as a Palati. He denied having any personal knowledge of her importation. He continued to say that many people bring in their girls when they are too poor to maintain them and such people are usually allowed to be left in his harem to be used as Palatis or disposed of in marriage to their caste people. He further stated that he heard that the girl was 17 or 18, but he had no occasion to see her. He also denied having issued any order to the other two appellants to bring in the girl, nor did he say that there was any negotiation about the girl with him. He admitted that the

a girl remained in his harem since she was taken in and she used to be looked after by his maidservants. He gave out that according to his household custom no girl is taken as Chauki Bai, etc., until she is kept under observation for some time. So there was no certainty in this connexion. The policeman ends the extract from his case diary from which these remarks are taken by saying :

"I further examined the proprietor's manager and office superintendent and they also made the same statement as the proprietor and disclaimed all personal knowledge about the girl or of the occurrence."

b In the circumstances such a statement was bound to give rise to the gravest suspicions. So much so, indeed, that the learned Subordinate Judge, taking the view he did, felt himself constrained to disbelieve this statement and to find that the Raja had made false answers to the policeman's questions for fear of criminal proceedings. In considering whether this inference is true or not, it is noteworthy that the Raja, though he was a plaintiff, was not called on the trial of the action. Even if his statement was untrue, their Lordships think it must have established a very reasonable belief in the minds of the respondents that there never was any question of making the girl a Chauki Bai. Indeed, their Lordships do not think it established that the Raja did intend to do so, much less that the respondents had no reasonable or probable cause for thinking that no marriage of any kind was contemplated. It is true that the learned Subordinate Judge has found that Harikrishna intended to give his daughter to be a Chauki Bai, but this finding, even if accepted, has no bearing upon the ultimate decision. In the first place Harikrishna is not a party to the present proceedings, and in the second even if he were, the question would not be what he intended but what the respondents reasonably thought his intentions were. As it is, what the respondents thought of Harikrishna's action is not directly material. The material question is what was the respondents' reasonable belief as to the circumstances in which and the object with which appellants 2 and 3 took away the girl.

In their Lordships' opinion, the respondents might well believe that the appellants' intention was to take her as a concubine, and it certainly has not been proved that there was no reasonable or probable cause for this view. As it was incumbent upon the appellants, if they were to succeed, to prove that no reasonable and probable cause for the prosecution existed, it follows that the appellants have not made out their case, and the suit fails in respect of all

three. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal to His Majesty in Council.

G.N.

Appeal dismissed.

Solicitors for appellants—*Hy. S. L. Pollock & Co.*

Solicitors for respondents—*W. W. Box & Co.*

A. I. R. (31) 1944 Privy Council 5

(*From Supreme Court of Palestine*)

24th June 1943

LORDS MACMILLAN, PORTER AND
CLAUSON, SIR GEORGE RANKIN AND
SIR MADHAVAN NAIR

Hanna Eissa Kawas — Appellant

v.

Bishara Elias Kawas and others —

Respondents.

Privy Council Appeal No. 41 of 1942.

Jurisdiction — Consensual — Consent of all parties is necessary—Absence of consent due to unwillingness or inability to consent (by minority) is fatal.

Where a consensual jurisdiction requires for its constitution the consent of all parties, this must mean the consent of all whose interests are concerned in the proceedings. If it be said that minors cannot give an effective consent, this does not justify proceedings without their consent. In the case of a consensual jurisdiction absence of consent, whether due to unwillingness to consent or inability to consent, is equally fatal. [P 6g]

*C. S. Rewcastle and S. A. Kyffin—*for Appellant.

Phineas Quass — for Respondents.

Lord Macmillan.—This is an appeal by the defendant in an action against him by the widow and two sons of his deceased brother in which they claim from the defendant an account of the transactions of a business carried on in Honduras by the defendant in partnership with the deceased and another brother, whose share was acquired by the defendant. Payment is also claimed of the deceased's share in the partnership assets as the same may be ascertained from the accounts. The case was contested by the defendant on various grounds but the only defence with which their Lordships are concerned is founded on an agreement dated 10th March 1925, made between the appellant on the first part and one Shaheen and the deceased's widow of the second part, in which the second parties are described as the legal guardians of the deceased's two sons then in minority "by virtue of a legal certificate of guardianship emanating from the Ecclesiastical Orthodox Court of Jerusalem." By this document it was agreed that the share of the widow in the partnership assets amounted to £250 and that of the two

a minor children to £1750. The agreement contained provisions relating to the manner of payment of these sums and the widow appears to have received certain sums in pursuance of it. If this agreement is valid and binding, it affords a complete answer to the respondents' claim for it quantifies and provides for the payment to them of the deceased's share in the partnership assets. But the Courts in Palestine have held that the appointment of Shaheen and the deceased's widow as guardians of his two sons was invalid and consequently that the agreement which they made as such guardians with the appellant is of no
 b avail to him as a defence except in so far as it concerns sums received by the widow on her own account. Having thus disposed of the obstacle interposed by the existence of the agreement of 1925, the Courts below fixed the share of the deceased in the partnership on his death in 1922 at \$24,500, on which sum they allowed interest at 6 per cent. to the date in 1927 when the partnership was due to expire, and gave judgment for payment accordingly subject in the case of the widow to deduction of the sums admittedly received by her. The respondents accept the judgment of the Courts below and have not cross-appealed.

c The only question argued before their Lordships and the only question which it is necessary for them to decide is whether the appointment of Shaheen and the deceased's widow as guardians of the two minor sons of the deceased was competently effected; if it was not, the agreement of 1925 is invalid and the judgment below must stand. The certificate whereby the deceased's widow was appointed guardian to the minor sons and Shaheen was appointed to assist her in performing her duties as guardian was granted in 1925 on her application by the Ecclesiastical Court of the Greek Orthodox Patriarchate,
 d Jerusalem. The jurisdiction of this Ecclesiastical Court to make the appointment is challenged and the question has to be determined by examination and interpretation of the Palestine Order in Council of 1922. Section 54 of the Order in Council provides as follows:

"The Courts of the several Christian communities shall have—(i) Exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of members of their community other than foreigners as defined in Art. 59. (ii) Jurisdiction in any other matters of personal status of such persons, where all the parties to the action consent to their jurisdiction. (iii)"

"Matters of personal status" are defined in S. 51 of the Order to mean

"suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of

persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons."

Now it will be observed that in conferring jurisdiction in matters of personal status on the Courts of the several Christian communities (of which the Court of the Greek Orthodox Patriarchate is one), the Order in S. 54 discriminates between certain selected matters, enumerated in para. (i), with regard to which it confers exclusive jurisdiction on these Courts and any other matters of personal status with regard to which in para. (ii) it confers jurisdiction only where all the parties to the "action" consent to their jurisdiction. Here
 f the word "action" is used, presumably as a synonym for the word "suit" used in S. 51. Neither word is strictly appropriate to denote non-litigious proceedings. Their Lordships, however, are inclined to infer from the context that these terms are used in a wide and general sense as meaning any proceedings of a judicial character in which the powers of a Court are invoked. Assuming without deciding this to be so, their Lordships are of opinion that all the proper parties to the application for the appointment of guardians to the two minors did not consent to the jurisdiction of the Ecclesiastical Court, for the minors themselves did not and could not consent. Where
 g a consensual jurisdiction requires for its constitution the consent of all parties, this must mean the consent of all whose interests are concerned in the proceedings. If it be said that minors cannot give an effective consent, this does not justify proceedings without their consent. In the case of a consensual jurisdiction absence of consent, whether due to unwillingness to consent or inability to consent, is equally fatal. On the other hand, if an application for the appointment of guardians does not fall within S. 54 (ii), as not being a suit or
 h action, then there is no provision in the Order conferring jurisdiction on this Ecclesiastical Court to entertain such an application. In that case, the application would require to be made to the Supreme Court sitting as a High Court of Justice which by S. 43 has

"jurisdiction to hear and determine such matters as are not causes or trials but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice."

Thus either way the appointment of guardians was invalid. It was made either by the wrong Court or by a Court for whose jurisdiction consent was essential but was wanting. Consequently, the agreement of 1925 to which the invalidly appointed guardians were parties is of no binding force, except to the limited

a extent indicated in the judgment under appeal. Their Lordships will humbly advise His Majesty that the appeal should be dismissed and the judgment of the Supreme Court of 31st July 1940, be affirmed. The appellant will pay the respondents' costs of the appeal.

R.K. *Appeal dismissed.*
Solicitors for Appellant — *T. L. Wilson & Co.*
Solicitors for Respondents — *Windsor & Brown.*

A. I. R. (31) 1944 Privy Council 7

(*From Ontario*)

8th July 1943

6 LORDS ATKIN, THANKERTON, RUSSELL OF KILLOWEN, MACMILLAN AND WRIGHT
Abitibi Power and Paper Co., Ltd.—
Appellant

v.

Montreal Trust Co. and others —
Respondents.

Attorney-General for Ontario —
Intervener.

Privy Council Appeal No. 58 of 1942.

(a) Constitutional Law—Legislature—Powers of, to legislate with respect to particular right.

c There is no authority and no reason for the opinion that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The Legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the Courts. If a Legislature can impose what may be a general moratorium there is no reason why its sovereign power should be so limited as not to enable it to impose if it so desired a moratorium limited to a special class of action or suitor or to one particular action or suitor. [P 11a,b]

d (b) Winding Up Act (Dominion Act of R.S.C. 1927), S. 21 — Leave under to proceed with action given — Action proceeds subject to stay under rules of procedure—Subsequent amendment of rules applies.

Once leave under S. 21 to proceed with an action is given, the action proceeds as a provincial action : subject to the provincial law regulating the rights in such an action, and subject to the sovereign power of the Legislature to alter those rights in respect of property within the province and subject to the possibility of being stayed under the ordinary rules of procedure as for instance for security for costs, default in pleading or discovery or any special circumstances which the Court might think demanded a stay. If the rules of procedure were subsequently altered before the action came to an end, it must proceed thereafter subject to the rules as amended. The provincial Legislature therefore can enact rules in the course of the action imposing a further ground of stay. [P 10g,h]

(c) Privy Council — Appeal — Legislation impugned—Privy Council when may impute object to legislation other than that appearing on face of it.

In an appeal involving the question of the validity of a legislation the Privy Council must have cogent grounds before it arising from the nature of the impugned legislation before it can impute to a legislation some object other than what is to be seen on the face of the enactment itself. [P 11c]

(d) Winding Up Act (Dominion Act of R.S.C. 1927), S. 21—Scope of.

Section 21 is not directed to secured creditors alone but is applicable to all claims against the company whether in contract or tort or otherwise. [P 10g]

(e) Privy Council Appeals Act (R.S.O. 1937), S. 1—Court ordering sale of property worth \$ 30,000,000—Case comes within S. 1.

Where the order in question which forms one of the final orders asked for in the statement of claim whether it were interlocutory or not, relates to a matter in controversy which exceeds the sum in value of \$ 4000, the case comes within S. 1. If a litigant is to be deprived by order of the Court of any rights over a property worth \$ 30,000,000, as he may be by an order of sale to which he objects, it would be reasonable to hold that there is a matter in controversy raised by the appeal exceeding the sum of \$ 4000. [P 11f,g]

Sir Walter Monckton and Frank Gahan —
for Appellant.

D. N. Pritt and P. Devlin; and Hon. C. Romer and G. Crispin — for Respondents (Montreal Trust Co.; and J. Ripley and others, respectively). g

W. Barton and F. Gahan — for Intervener (Attorney-General of Ontario).

Lord Atkin.—This is an appeal from the Court of Appeal for Ontario who by a majority (Gillanders J., dissenting) dismissed the appeal of the appellant from an order of Middleton J. A. which ordered that all the property of the company should be sold by public auction. The question in the case is the validity of Acts of the Ontario Legislature, the Abitibi Power and Paper Co. Ltd. Moratorium Act, 1941, and a further Act the Abitibi Power and Paper Co. Ltd. Moratorium Act, 1942. The Acts were passed in the following circumstances. h

The appellant company was incorporated in 1914 by Letters Patent of the Dominion of Canada to acquire the undertaking of the existing company The Abitibi Pulp and Paper Co. In 1928 it made an issue of first mortgage gold bonds due 1953, of which in the year 1932 \$48,267,000 with interest at 5 per cent. were outstanding. The bonds were charged on the whole property and undertaking of the company. There were also issued \$1,000,000 in 10,000 shares of 7 per cent. cumulative preferred stock ; \$34,818,000 in 341,818 shares of 6 per cent. cumulative preferred stock ; 1,088,117

a common shares no par value upon which the book value placed was \$18,964,933.

As may be seen from the capital structure the company was a vast undertaking, dependent for its supply of pulp wood upon the crownlands of the Province of Ontario, which it obtained under agreements for 21 years, and dependent for its water power on leases and licences from the Crown. A convenient summary of the position is given by Robertson C. J. in his judgment giving leave to appeal in the present case:

b "An essential part of the property covered by the mortgage consists of leases, licences, agreements, water power rights, privileges, franchises and concessions granted by the Province of Ontario. As is stated in the report of a Royal Commission that inquired into the affairs of the defendant company, whose report is before us and was referred to in argument, 'Abitibi is dependent for its supply of pulpwood upon the Crown lands of the Province of Ontario. It also requires large quantities of power, in respect of which it is dependent upon leases from the Province.' These licences, leases and other rights are granted in most, if not in all cases for fixed terms of years, and some of these have expired or are about to expire. As to some others the company is in default either in payment or in the performance of its covenants. If the Province of Ontario should exercise its rights strictly, the mortgaged premises would hardly be saleable at any price. Mills in which large sums of money are invested would be worthless without power to run them or pulpwood to supply them. In the report of the Royal Commission to which I have referred there is set forth on pages 10 and 11 a long list of the defendant company's further requirements from the Province, as given by the receiver. No doubt the Province is in the habit of co-operating fairly with persons who invest their money in establishing and developing industries on the lands of the Crown and in opening them up to settlement, and improving them, but when, as here, there may be danger that many persons who have invested largely will lose their investment, the Government of the Province may have some concern. It may well be that on a sale for cash none but bondholders who can turn in their bonds in payment, will be in a position to buy, especially in view of the difficulty of raising large amounts of capital for such investment in war time. To avoid a result that may wipe out the investment of a great many people and that in such an event may cause some embarrassment to the Government in dealing with the property rights and interests of the Province, it is, to say the least, understandable that the proposed sale for cash should be the subject of some concern to the Legislature, whatever opinion one may have as to the power of the Legislature to enact the statute in question."

d Subsidiary companies in which the company owned the majority of shares also carried on similar businesses in Manitoba and Quebec. The gold bonds were secured by a trust deed in ordinary form dated 1st June 1928, made between the company and the present respondents, the Montreal Trust Co., whereby the company mortgaged and charged the whole of their property and undertaking to the Trust Company in trust for the holders of the first

e mortgage gold bonds. There was another party to the deed, the National City Bank of New York, as "authenticating trustee." They were not parties to the action and no further reference need be made to them.

f In 1932 the company made default in payment of the half-yearly instalment of interest due on 1st June, and thereupon in pursuance of a power in the trust deed the Montreal Trust Co. Ltd., by writ issued on 8th September 1932, commenced the ordinary debenture holders' action claiming administration of the trusts of the debenture trust deed, a declaration that the indenture and mortgage were a first charge on the undertaking of the company, to have an account of what was due on the mortgage, to have the undertaking property and assets of the company sold under the direction of the Court, and for the appointment of a receiver and manager.

g On 10th September 1932, Riddell J. A. appointed G. T. Clarkson receiver and manager of the undertaking and gave leave to named members of a bondholders committee to attend the proceedings. Subsequently these gentlemen or some of them were by order of Middleton J. A., dated 13th September 1935, added as defendants in the action, and are in addition to the plaintiff-respondents to the present appeal.

h So far the action was plainly a mortgagees' action brought in the Courts of Ontario affecting property in Ontario and the civil rights of the mortgagee and subject to the exclusive authority of the provincial Courts and the provincial Legislature. It has to be determined how far if at all this position was altered by subsequent proceedings. On 15th September 1932, an unsecured creditor, Canada Packers Ltd., filed a petition in bankruptcy against the company, in breach of a provision of the order appointing a receiver that no proceeding should be taken against the company without leave of the Court. Their Lordships do not stay to examine the validity of this provision, for on 26th September on the application of the same creditor Sedgewick J. made four consecutive orders: (i) Granting leave to the creditor to proceed against the company under the provisions of the Bankruptcy Act and / or the Winding Up Act and confirming the petition dated 15th September. (2) On the creditor's petition adjudicating the company bankrupt, making a receiving order against it, and appointing a custodian of the estate. (3) Granting leave to the creditor to apply for a winding up order against the company. (4) On the petition of the creditor declaring that

a the company was insolvent, and ordering it to be wound up.

On 25th November 1932, F. C. Clarkson was appointed liquidator of the company, and so acted until 20th December 1935, when he resigned, R. S. McPherson being appointed in his place. The Winding Up Act (a Dominion Act of R. S. C., 1927, c. 213, s. 21) provides

"After the winding up order is made no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court imposes."

The Court referred to is the appropriate b Provincial Court acting in this capacity as a Dominion Court with Dominion jurisdiction. On 7th December 1932, the following order was made by Garrow J. and as controversy arises as to its effect it will be as well to set it out.

"In the matter of the Winding Up Act, being Chap. 213 of the Revised Statutes of Canada, 1927, and Amending Acts, and In the matter of Abitibi Power and Paper Company Limited.

1. Upon the application of Counsel for Montreal Trust Company, the plaintiff in an action commenced in this Court on 8th September 1932, against the above named Abitibi Power & Paper Company Limited for the enforcement of the trusts and security of a certain Deed of Trust and mortgage dated as of 1st c June 1928, made by the said Abitibi Power & Paper Company Limited in favour of the said Montreal Trust Company and the National City Bank of New York as Trustees, in the presence of Counsel for F. C. Clarkson, Esquire, the Liquidator appointed herein, upon reading the Writ of Summons in the said Action and upon hearing what was alleged by Counsel aforesaid.

2. It is ordered that the said Montreal Trust Company shall be at liberty to proceed with the said action against the said Abitibi Power & Paper Company Limited notwithstanding the winding-up order made herein the 26th September 1932.

'D'ARCY HINDS',
Registrar, S.C.O."

Thereupon the action proceeded leisurely as negotiations from time to time took place d for a reconstruction and it was not till 15th February 1937, that the statement of claim was delivered claiming the relief mentioned in the writ. On 16th September 1937, the company delivered its defence, alleging on various grounds that the charge was not valid, and disputing the jurisdiction of the Provincial Court save for the purpose of determining the validity of the charge. On 3rd November, Kingstone J. on the trial of the suit declared the charge valid and gave liberty to apply as to any further directions. On 10th June 1940, Middleton J. A. on motion of the plaintiffs ordered a sale of the company's undertaking under the direction of the Master and gave leave to any bondholder to bid. In October the Master reported that he

had received two bids of \$30,000,000 and e \$40,300,000. The latter he rejected as not complying with the conditions of sale: but reported that neither bid was equal to the reserve which he had fixed. The sale therefore proved abortive. On 1st November 1940, a Royal Commission was appointed by Order in Council in Ontario, consisting of three commissioners

"to inquire into the affairs and financial structure of the company with a view to recommending an equitable plan for solving the financial difficulties of the company so that the company may be in a position to meet conditions, regulations and restrictions which the Lieutenant-Governor-in-Council may consider necessary upon the grant or renewal of the f hereinbefore recited leases, licenses, waterpower rights, flooding rights, licenses of occupation and other rights, powers or privileges, and generally to make such recommendations in the premises as appear to be in the best interest of all parties concerned, including the Province of Ontario."

On 17th March 1941, the Commission reported. It is unnecessary to discuss their findings and recommendations in detail. They criticised the present Dominion legislation in so far as it dealt with schemes of reconstruction of such large concerns as the present: they stated that the Government and the public had a huge stake in the pulp and paper industry: and that no price could be obtained g for the undertaking and assets under present conditions which would begin to approach the amount of the outstanding bonds with interest thereon, and they outlined a plan whereby the maturity of the bonds was extended for 25 years with provisions for maintaining the rights of the bondholders, and in the absence of default for payment by instalments of some portion of the ordinary creditors' claims. They recognised that to secure this object recourse would have to be had to Dominion legislation.

Meantime, on 25th November 1940, the plaintiff had given a further notice of motion h for sale which was ordered to stand over pending the report of the Royal Commission. After the Report of the Royal Commission the Legislature on 9th April 1941, passed the Act of which the validity is questioned in these proceedings. It recites the various motions for sale, and recites a summary of the Report of the Royal Commission and finally recites whereas it is deemed desirable to stay any action now pending or that may hereafter be taken under the provisions of the above mentioned bond mortgage for the sale of all the property and assets of the said company situate in Ontario in order that an opportunity may be given to all parties concerned to consider the plan submitted in the Report of

10 Privy Council ABITIBI POWER ETC. CO. v. MONTREAL TRUST CO. (Lord Atkin) A. I. R.

a the said Royal Commission, and then proceeds to enact (S. 1) that as far as any property in Ontario is concerned no further proceedings should be taken or continued under the order of Middleton J. A. of 10th June 1940 [This, in fact, was already exhausted]. (S. 2) that without the consent of the Attorney-General no new action should be brought for the purpose of realising on the mortgage, and no further step should be taken in the action then pending. The Act was to come into force on a day to be named by the Lieutenant-Governor, and by Order in Council its operation might be determined at any time, but b otherwise it was to remain in force until 31st December 1942.

On 9th October 1941, the notice of motion for sale which was then standing over was renewed: and on the same day the Lieutenant-Governor made a proclamation bringing into force the Moratorium Act. On 17th October, the plaintiff gave notice that at the hearing of the motion for sale the validity of the Moratorium Act would be disputed on the ground that it dealt with matters that fall under the head Bankruptcy and Insolvency under S. 91, British North America Act. The motion was heard on 27th November 1941, by c Middleton J. A. when counsel for all parties interested and the Attorney-General for Ontario were heard. In his considered judgment, given on 4th December 1941, Middleton J. A. held the Act to be ultra vires and ordered the sale of the property and assets of the company to take place under the direction of the Master and subject to a reserve bid, with liberty to the bondholders to bid. On appeal this order was affirmed by the Court of Appeal on 21st March 1942, Gillanders J. A. dissenting.

The objection to the Act that was expressed by Middleton J. A., and by the members of d the Court of Appeal may be summarised by saying that leave to continue the action had been given under the powers of the Dominion Act (Winding Up Act, S. 21) and that the Legislature could not thereafter interfere with the proceedings in the action without encroaching upon the exclusive Dominion powers to legislate on the class of subjects Bankruptcy and Insolvency. The right to take away the cause of action, said Fisher, J. A., is vested in the Dominion unless the Dominion has not seen fit to deal with it: and S. 21, Winding Up Act, does deal with it. Henderson J. A. went further and was of opinion that legislation in the province passed in respect to property and civil rights in the province must not be legislation aimed at a

particular firm or corporation but must be e general in character. "The legislature is not competent to deny access to His Majesty's Courts in an individual case."

Their Lordships are unable to agree with the decision in the Ontario Courts. It has to be remembered that this action when commenced was subject solely to the laws of the Province, which at any time in pursuance of the sovereign power entrusted to the Legislature in this respect might be altered as the Legislature thought fit. When the company was ordered to be wound up the bondholders might in pursuance of Ss. 78 to 84 claim in the winding up as secured creditors: they f would in that case have had to put a specified value on the security: and the liquidator could have consented to the retention by the creditors of their security or could have required the transfer to him at the specified value to be paid out of the estate when he had realised the security. The bondholders in this case made no claim at all in the winding up. Their security was known to be insufficient to meet the mortgage debt, and they deliberately remained outside: and proceeded to continue to exercise what may be called their provincial rights against the provincial property. They were required by S. 21, Winding Up g Act, to get leave to continue their action, a provision which is not directed to secured creditors alone but is applicable to all claims against the company whether in contract or tort or otherwise. In view of the circumstances the leave to proceed was *ex debito justitiæ*. The Court could not rightly have refused it. Once granted the action proceeded as a provincial action: subject to the provincial law regulating the rights in such an action, and subject to the sovereign power of the Legislature to alter those rights in respect of property within the Province. It could not be denied that the action proceeded subject to h the possibility of being stayed under the ordinary rules of procedure as for instance for security for costs, default in pleading or discovery or any special circumstances which the Court might think demanded a stay. Middleton J. A. appreciated this position: but expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant: their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end it must proceed thereafter subject to the rules as amended. The Province therefore could enact

a rules in the course of the action imposing a further ground of stay: and if it can thus impose what may be a general moratorium there is no reason why its sovereign power should be so limited as not to enable it to impose if it so desired a moratorium limited to a special class of action or suitor or to one particular action or suitor.

b There appears to be no authority and no reason for the opinion that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The Legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not in any case subject to control by the Courts. The short answer therefore to the contentions of the plaintiff is that the action though continued by leave of the Winding Up Court never became a proceeding in the winding up, and that the temporary interference with it by the Legislature to which it was subject was not an intrusion into the field of bankruptcy and c insolvency. It was pressed upon their Lordships that the real substance of the legislation was an attempt to coerce the bondholders into accepting a plan of reconstruction and that arrangements such as were contemplated by the report of the Royal Commission were within the exclusive field of Dominion legislation. So they are, but this Board must have cogent grounds before it arising from the nature of the impugned legislation before it can impute to a provincial legislation some object other than what is to be seen on the face of the enactment itself. In the present case their Lordships see no reason to reject d the statement of the Ontario Legislature contained in the preamble to the Act that the power to stay the action is given in order that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission. That the Act was renewed in March 1942, by another temporary Act expiring in June 1943, affords no reason for modifying this view: nor does the fact that the plan suggested by the Royal Commission involves recourse to Dominion legislation. The pith and substance of this Act is to regulate property and civil rights within the Province. It was contended that the Act was passed in relation to the management and sale of the Public Lands belonging to the Province and of the timber and wood thereon;

e but in view of what has been said on the topic of property and civil rights in the Province, it is unnecessary to discuss this further ground for supporting the validity of the Act.

A preliminary objection was taken to the regularity of the order of the Court of Appeal on the ground that the case did not fall within s. 1, Privy Council Appeals Act, R. S. O., 1937, c. 98, giving an appeal where the matter in controversy in any case exceeds the sum or value of \$4,000. It was said that the order under appeal was an interlocutory order, and the appeal was granted because there were exceptional circumstances by reason of the importance of the constitutional question. f Their Lordships intimated at once that if necessary in view of the constitutional question they would give leave to file a petition for special leave in favour of which they would report, and counsel for the respondents very reasonably did not further press the objection. Their Lordships are, however, satisfied that the order in question which forms one of the final orders asked for in the statement of claim, whether it were interlocutory or not, relates to a matter in controversy which exceeds the sum in value of \$4,000. If a litigant is to be deprived by order of the Court of any rights over a property worth \$30,000,000, as g he is by an order of sale to which he objects, it would appear reasonable to hold that there is a matter in controversy raised by the appeal exceeding the sum of \$4,000. On this ground the preliminary objection fails. For these reasons the appeal should be allowed and the orders of Middleton J. A., and the Court of Appeal be set aside and the motion for sale should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The Montreal Trust Company must pay the costs of the company in the Ontario Courts and on this appeal.

G.N. *Appeal allowed.* h

Solicitors for Appellant — *Blake & Redden.*
Solicitors for Respondents — *Lawrence Jones & Co., and Linklaters & Paines.*
Solicitors for Intervener — *Blake & Redden.*

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(*From Calcutta: ('40) 27 A. I. R. 1940*
Cal. 296)

2nd November 1943

LORD ATKIN, LORD PORTER AND
SIR GEORGE RANKIN

Sarala Sundari Dassya — Appellant

v.

Dinabandhu Roy Brajaraf Saha (Firm)
— *Respondents.*

Privy Council Appeal No. 6 of 1942, Bengal
Appeal No. 17 of 1939.

- ^a (a) Succession Act (1925), Ss. 263 and 283 — Creditor of heir of testator is entitled to apply for revocation of probate.

It cannot be said that it is only those persons who could be cited before the grant of probate who are the persons who could apply to revoke the probate. If a person is complaining that he has in fact been defrauded, he is one of the persons who is injured by the fraud alleged and that person is entitled to have his redress by applying to revoke the probate and thereby cause the fraud to become inoperative. Therefore the creditor of an heir of a testator who says that he is being or is likely to be defeated in his rights against the heir by reason of property which otherwise appeared to be in possession of the heir being withdrawn by a will, has locus standi to apply for revocation of the probate on the ground that the grant was obtained fraudulently : 1 O. C. 19 (P. C.), *Rel. on.* [P 12f,h ; P 13a,b,c]

- ^b (b) Practice—Privy Council—Genuineness of document in issue — Parties should produce either original document or at least photostatic copy of it.

When their Lordships of the Privy Council have to deal with the question of whether or not a document is forged, it is obviously of first importance that they should have the document before them. It is a rule of practice in all cases where the genuineness of a document is in issue, that the parties concerned should bring before their Lordships, either the original document or, at any rate, a photostatic copy of it, so that their Lordships should be in the same position as the Courts in India or elsewhere, of having the document before them and being able to form their own impression upon an inspection. It is so important that, as a general rule, it is probable their Lordships would find it necessary to adjourn any case for the production of such a document if it were not forthcoming. [P 13d,e,f]

Sir T. Strangman and U. Sen Gupta —

for Appellant.

S. P. Khambatta — for Respondents.

- ^d **Lord Atkin.**—This is an appeal from the High Court of Judicature at Fort William in Bengal which reversed the judgment of the District Judge at Pabna on an application by the respondents for the revocation of the probate of a will of an alleged testator Haralal Saha, which had been obtained by his widow, who is the appellant, in the year 1933. The circumstances were that Haralal Saha was a man of some age and had been very successful in his business, which was principally that of a moneylender. He owned immovable property in several districts in Bengal and in one district outside. He died in 1927 and, upon his death, there can be no doubt, that his three sons who survived him took possession of the properties. In some instances they had joined in a suit with their mother and were substituted for their father in a partition suit. They got a certificate of succession to enable them to sue on certain debts which were due, no doubt, on the moneylending business. They collected the rents of the immovable properties and they proceeded, both they and the

widow, precisely as they would have proceeded if there had been an intestacy.

It would appear that the sons did not pursue the moneylender's business which, at any rate, in five or six years' time had, as the learned Judges found, disappeared; but they had in the name of a company conducted a business in electric lighting equipment, and they had incurred a debt to the present respondents, also for the purpose of their business, of 5000 rupees. In November 1933, the respondents had obtained a decree against them for 5000 odd rupees. Their Lordships have no doubt that at that time they were in financial difficulties, as is shown by the fact that in the next year they were adjudicated insolvents. In February 1933, more than six years after the death of the alleged testator, the present appellant applied for probate of a will which she produced then for the first time. It is not surprising that that attracted a good deal of suspicion. The respondents came to the conclusion that the will was a forged document and in August 1935, they applied for revocation of the probate.

The first question that arises is more or less a technical question as to whether or not the respondents had a locus standi so as to be in a position to apply for revocation of the probate. That depends upon certain clauses in the Succession Act, 1925. By s. 263 "The grant of probate may be revoked for just cause." By the explanation, "just cause shall be deemed to exist where" — only three of them need be read —

"(a) the proceedings to obtain the grant were defective in substance or (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case, or (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently."

It may be noticed that the section does not deal expressly, so far, with forgery, but one of the illustrations given in the section is (iii), "The will of which probate was obtained was forged or revoked." The question arises whether the creditor of an heir who says that he is being or is likely to be defeated in his rights against the heir by reason of property which otherwise appeared to be in possession of the heir being withdrawn by a will, is allowed to move to revoke the probate. Attention has been called to s. 283, which provides : "In all cases the District Judge may"—then "(c) issue citations calling upon all persons, claiming to have any interest in the estate of the deceased, to come and see the proceedings before the grant of probate."

It is suggested that it is only those persons

a who could be cited before the grant of probate who are the persons who could apply to revoke the probate. In their Lordships' view that is putting it on much too narrow a footing. One of the grounds for revoking probate is that the grant was obtained fraudulently by making a false suggestion, which obviously covers the case of putting forward a forged will, just as (c) would cover the case of a person putting forward a forged will even if when he or she propounded it he or she did not know it was a forged will.

b In dealing with the first point, that the grant was obtained fraudulently, it appears to their Lordships to follow as a matter of course that if a person is complaining that he has in fact been defrauded, he is one of the persons who is injured by the fraud alleged and that that person is entitled to have his redress by applying to revoke the probate and thereby cause the fraud to become inoperative. If he had not such a right as that, it is very difficult to know what right a creditor in those circumstances, or a person injured by the fraud, could have, otherwise the probate would stand and he would be affected by the probate which had been obtained ex hypothesi fraudulently. That is the view which c was taken by their Lordships in 10 I. A. 80.¹ It has been followed since in Calcutta, and their Lordships feel satisfied that in this case the applicants for revocation had every ground for applying and had a proper locus standi to come into Court and ask that the probate should be revoked.

Thereupon the further question remains to be determined as to whether or not this will was fraudulent. The learned District Judge, after dealing with the circumstances and the evidence, came to the conclusion that though the facts were suspicious, he was not prepared to go so far as to hold that forgery had in d fact been committed and dismissed the application. The learned Judges in the High Court took a different view, and they were both of them quite clearly of opinion that the applicants had established affirmatively that this will was a forged will. That being so, it is unnecessary for their Lordships to deal with the question of onus of proof which in this case does not arise in view of the findings by the High Court.

When their Lordships have to deal with the question of whether or not a document is forged, it is obviously of first importance that they should have the document before them.

Their Lordships repeat what was said at the beginning of these proceedings, that it should be considered to be a rule of practice in all cases where the genuineness of a document is in issue, that the parties concerned should bring before their Lordships, either the original document or, at any rate, a photostatic copy of it, so that their Lordships should be in the same position as the Courts in India or elsewhere, of having the document before them and being able to form their own impression upon an inspection. It is so important that, as a general rule, it is probable their Lordships would find it necessary to adjourn any case for the production of such a document if it were not forthcoming. In f this case their Lordships have had the advantage of a very full description of the document by one of the learned Judges, Mitter J., by whose very careful account their Lordships have been very much assisted, for it enables them to deal with the issue satisfactorily even though they have not the actual will before them.

It is unnecessary, in their Lordships' opinion, to go through the details which have led the High Court to come to the conclusion that this was a forged document. Their Lordships are entirely satisfied with the judgment g of the two learned Judges, which they consider to be convincing; but it is enough to say that the circumstances under which the will was produced in the first instance and the conduct of the parties throw so much suspicion upon the existence of a will that when the document is looked at it is very easy to see that they are face to face with a document which obviously was prepared after the event and which was not a genuine will of the alleged testator.

The will is signed upon paper which there is plenty of evidence to show was used by the testator in his business for the purpose of h the numerous legal proceedings which, in his course of business as a money-lender, he would be engaged in for the purpose of having papers and so forth put before the Court. They were papers which the testator was in the habit of signing in blank, signing at the bottom, and occasionally both at the bottom and at the top. This will is written on two such sheets, the first of them signed at the top, the second one signed at the top and at the bottom in the extreme right-hand corner. It is sufficient to say that, upon the appearance of the document, it is reasonably plain that the man who wrote the document was not able to complete the will in such a form as to fit in with the signature so as to make the signature in any

1. ('07) 1 O. C. 19 : 10 I. A. 80 : 4 Sar. 449 : 13 C. L. R. 314 (P. C.), *Rajah Nilmoni Singh Deo Bahadoor v. Umanath Mookerjee*.

a sense approximate to the body so as to authenticate the body. The result was that there was a gap of at least two and a half inches which was not filled in at all. Then there was a form which indicated that it was signed by the testator as his last will, which was drawn at the bottom of the page so as to coincide with and approach the signature. In other words, the document is drafted to fit into the signature, and the signature was not put there in order to authenticate the document.

It is unnecessary to deal with all the matters which have been referred to by the learned Judges which help their Lordships to come to the conclusion that this was a forged will. Their Lordships have no doubt at all that the conclusion of fact was well warranted and was in fact right. In those circumstances the appeal fails and must be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

K.S.

*Appeal dismissed.*Solicitors for Appellant — *W. W. Box & Co.*Solicitors for Respondents—*T. L. Wilson & Co.***A. I. R. (31) 1944 Privy Council 14***(From Patna)*

19th October 1943

LORD THANKERTON, LORD PORTER AND
SIR GEORGE RANKIN*Krishna Kant Prasad Shukul and
another — Appellants*

v.

*Dhanu Lal Choudry and others —**Respondents.*Privy Council Appeal No. 51 of 1940, Patna
Appeal No. 17 of 1936.

(a) Civil P. C. (1908), O. 32, R. 4 (Patna) —
Suit to enforce mortgage executed by Hindu
father on behalf of himself and minor sons —
d Father refusing service of notices — Mother of
minors alive—Appointment of pleader as guar-
dian for minors held most proper.

In a suit to enforce a mortgage executed by a Hindu father on behalf of himself and his minor sons the plaintiffs suggested the name of the father for appointment as guardian for the minors as being the natural guardian and as the person in whose care the minors were. The father refused service of notices which had to be fixed to a door at his residence. A number of registered cards were sent to him but he did not appear and the Court eventually appointed a pleader as the guardian for the minors. The mother of the minors was alive and the question was whether there was in the appointment of a pleader guardian an element of irregularity which had prejudiced the minors :

Held that (1) the Court might very properly regard the mother of the minors as being like her husband a person with an interest adverse to the minors, unlikely as a purdanashin to be capable of

handling troublesome litigation and only too likely to be under the influence of her husband; [P 16d]

(2) the appointment of a pleader guardian was the most sensible and proper course to take in the interest of the minors. [P 16g]

C. P. C. —

('44) Chitaley, O. 32 R. 4 Notes 5 and 9.

('41) Mulla, Page 1025 Note "Sub-rule (4) : Guardian-ad-litem"; Page 1023 Note "Sub-rule (1) : Adverse interest."

(b) Hindu law—Minor—Suit to enforce mortgage executed by father on behalf of himself and his minor sons — Strenuous contest by pleader guardian on behalf of minors — Very full enquiry made into circumstances and consideration for mortgage loans—Loans found for antecedent debt and legal necessity and decree passed against father and minor sons—Subsequent suit by minors to set aside decree on ground that loans were for immoral purposes—Decree held could not be set aside.

In a suit to enforce the mortgage executed by a Hindu father on behalf of himself and his minor sons, the minors were represented by a pleader guardian duly appointed by the Court. The written statement filed by the pleader guardian on behalf of the minors had denied the passing of any consideration for the mortgage bond, and pleaded that there was no legal necessity for the loans and no benefit to the family. A very full enquiry was made into the circumstances of and consideration for the loans, the mortgagees were put to strict proof of their claims and a decree was then passed against the father and the minor sons as the mortgage loans were found to be for antecedent debt and for legal necessity. The minors notwithstanding their pleader guardian's strenuous contest on their behalf brought a suit subsequently for setting aside the mortgage decree on a new ground that the mortgage loans were taken by their father for immoral purposes or to discharge antecedent debts incurred for immoral purposes :

Held that a charge of immorality would not have been of any service to the minors in the mortgage suit and in any view of the matter, the absence of this line of defence could not be attributed to irregularity in the appointment of the guardian. A very full enquiry was made into the circumstances of and the consideration for the loans and no good reason had been shown for setting aside the decree which was passed. [P 16g]

Hindu Law —

('40) Mulla, Page 351 Ss. 294B (2) and (4); h
Page 368 S. 298 ; Page 356 S. 295.

('38) Mayne, Page 432 Paras. 335 and 336.

C. P. C. —

('44) Chitaley, O. 32 R. 3, Notes 5, 12, 13.

('41) Mulla, Page 1020 Note "Non-representation";
Page 1022 Note "Fraud of guardian ad-
litem."*S. P. Khambatta — for Appellants.**Phineas Quass — for Respondents.*

Sir George Rankin. — The appellants are the two minor sons of respondent 9 Bate Krishna Prasad. By their mother Sm. Avadesh Dulari Debi they sue to have a mortgage decree dated 18th December 1931, set aside as against them and to establish that their interest in the joint family property is not liable for the monies due thereunder. The

• mortgagees who obtained the decree of 1931 are respondents 1 to 7, herein called the respondents. Respondent 8 is a puisne mortgagee and need not be further mentioned. The present suit was brought on 26th July 1933, in the Court of the Subordinate Judge at Muzaffarpur. The appellants succeeded in the trial Court whose decree was dated 16th December 1935, but the High Court at Patna on 9th March 1939, dismissed their suit.

The mortgages in question are three in number and were executed by the appellants' father (respondent 9) in terms which purport to bind their interests. (1) The first dated 19th July 1924, was for Rs. 20,000. Apart from a small sum of Rs. 200 and a sum of Rs. 400 borrowed to pay the costs of the mortgage, this loan was expressed to be made — as to Rs. 9098, to pay off a previous loan made by the respondents on a bond dated 16th August 1917; as to Rs. 4650, to pay off a decree in favour of one Shyam Nundan Sahay; and as to Rs. 5650 to meet a decree for maintenance obtained by a lady called Deokeshari. These debts were not incurred for the benefit of the joint family but as antecedent debts of the father, respondent 9, they have been held by the High Court to come within the principle • that a father can mortgage the joint property to discharge a debt contracted by him for his own personal benefit. (2) When the second mortgage, dated 28th March 1925, came to be made it appeared that the whole sum of Rs. 5650 had not in fact been paid to Deokeshari but only Rs. 2600; and that she was taking execution proceedings for the balance which by this time amounted to Rs. 7300. Apart from Rs. 255 borrowed for the costs of the mortgage, Rs. 4745 was taken to save certain properties which had been put up for sale. The High Court have found that the mortgagees took care to see that the money was • this time applied to the discharge of the maintenance decree but that a stay of the sale could not be obtained; and that in the end the money or the bulk of it was expended for the purpose for which it was taken by buying back the properties in the name of a nominee. (3) The third mortgage was on 18th May 1926, for Rs. 2500. Of this, Rs. 2090 was expressed to be taken to pay off one Noorullah or Sadhulla Khan who had lent money on a hand-note to meet revenue and cesses, repairs to the family house and for clothes. The rest was said to be necessary to meet medical expenses. The High Court have found that there was such a hand-note, and that it was paid off with the money borrowed for the purpose.

On the merits the appellants' case which

the trial Judge accepted was that their father, • respondent 9, was addicted to evil habits, was borrowing the monies in question for immoral purposes and was spending it upon intoxicating drink and prostitutes. In addition to a body of general evidence as to his bad character and depraved habits, the appellants made a positive case that the sum exceeding Rs. 10,000 received by him from the first mortgage (19th July 1924) or the great part of it was immediately squandered upon prostitutes. They called four witnesses to prove the division of the money among such women. The trial Court accepted their evidence; but the High Court regarded them as unworthy of • credit and on a careful examination of their evidence rejected their story as one which had broken down. Their view in the end was that however successful the appellants may have been in attacking their father's character, they have not succeeded in connecting the loans which are now in question with the immorality alleged.

The initial difficulty of the appellants is to get behind the mortgage decree of 1931 which was passed against them in a suit (No. 92 of 1930) in which, by one Mahendra Prasad Sinha a pleader as their guardian ad litem, they had contested the claim of the mort- • gagees. A written statement filed on their behalf had denied the passing of any consideration for the mortgage bonds, and pleaded that there was no legal necessity for the loans and no benefit to the family. A careful judgment dealt very fully with the consideration for the loans at the instance of the guardian and also of a puisne mortgagee who also had put the mortgagees to strict proof of their claim. The execution of the bonds was held to have been proved, as also were the various payments, including the payment of Rs. 10,502 under the first mortgage by a cheque on the Benares Bank at Muzaffarpur. • The learned Subordinate Judge dealt separately with each of the three loans, finding that the first was for antecedent debt and for legal necessity, that due enquiry as to legal necessity had been made as to the second, and that the third was for legal necessity. The appellants, notwithstanding their guardian's strenuous contest on their behalf, claim to reopen the question of their liability on the bonds by introducing as a new defence an allegation that the loans were taken by their father for immoral purposes or to discharge antecedent debts incurred for such purposes. They say also that their mother should have been appointed to be their guardian in the mortgage suit and that had she been guardian

- a she would have put forward the immoral habits of her husband as a defence. On this question the Courts in India have differed in opinion. The learned trial Judge has held that the mortgagees fraudulently concealed the fact of the mother's existence, that the pleader guardian was negligent, and that the minors were not represented or not properly represented in the mortgage suit. The High Court have negatived these findings of fraud and negligence and hold that there were reasons against the appointment of the mother as guardian and that even if it was wrong to pass her over this was at most an irregularity
- b which would not entitle the appellants to have the decree set aside.

Their Lordships find themselves in agreement with the High Court upon this aspect of the case. There is no evidence that the mortgagees concealed the fact of the mother's existence from the Court in the mortgage suit or practised any species of fraud or concealment. Indeed while the order sheet in that case was put in evidence the mortgagees' petitions and affidavit are not even in the record, though the present case was begun only two years after the mortgage suit was decreed. Hence the exact statements made to the Court

c by the mortgagees are not proved. The evidence shows the pleader guardian to have done all that he properly could. He even asked to be allowed expenses for a journey to the appellants' village to collect information on the spot, but this the learned Judge in his discretion refused, intending him to get his instructions by post. In their Lordships' view no case of fraud or negligence can be seriously maintained, and the sole question which requires consideration is whether there was in the appointment of a pleader guardian an element of irregularity which has prejudiced the minors. In the plaint it is falsely stated

d that no notice of the mortgage suit was served on respondent 9 and it is alleged that "without issue of any other notice a pleader was appointed as guardian ad litem for the plaintiffs." That the mother should have been appointed is not pleaded, and their Lordships think that the Court might very properly regard her as being in this case like her husband a person with an interest adverse to the minors, unlikely as a purdanashin to be capable of handling troublesome litigation and only too likely to be under the influence of her husband. She was not the natural guardian of the minors. The mortgagees were wrong in thinking that respondent 9 had not an interest adverse to the minors but they did no more than was usual when they put

forward the name of respondent 9 as being the natural guardian and as the person in whose care the minors were. He had to have notice but if the Court had appointed him then indeed the minors would have had a grievance as his interest was adverse. What happened was that he refused service and the notices had to be affixed to a door at his residence. The plaintiffs on 17th September 1930, asked the Court to appoint someone else and on 10th November they were ordered to take steps to have a registered card issued to him by the Court. A number of such communications were sent to him. The pleader was not appointed till 17th November. In January 1931, respondent 9 appeared and asked for time to file his defence: he was given time till 12th March but made default; and the case was not heard till the following November.

It appears that cl. 4 of R. 4 of O. 32 of the Code was in 1927 amended by the Patna High Court so as to substitute for the words "where there is no other person fit and willing to act as guardian for the suit" other words: viz. "where the person whom the Court . . . proposes to appoint as guardian for the suit fails . . . to express his consent to be so appointed."

The substance of the matter, in any case, is that the appointment of a pleader guardian was the most sensible and proper course to take in the interest of the minors. Their Lordships are far from thinking that a charge of immorality against respondent 9 would have been of any service to the minors in that suit, but in any view of the matter, the absence of this line of defence is not to be attributed to irregularity in the appointment of the guardian. A very full enquiry was made into the circumstances of and the consideration for the loans and in their Lordships' judgment no good reason has been shown for setting aside the decree which was passed. They will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of respondents 1 to 7, who alone appeared.

G.N.

*Appeal dismissed.*Solicitors for Appellants — *A. J. Hunter & Co.*

Solicitors for Respondents —

Douglas Grant & Dold.

a **A. I. R. (31) 1944 Privy Council 17**

(From : Bombay)

21st October 1943

LORDS ATKIN, THANKERTON, PORTER
AND CLAUSON AND SIR GEORGE RANKIN*Morarji Goculdas & Co.—Appellants*

v.

*Sholapur Spinning and Weaving Co.
Ltd. and others — Respondents.*Privy Council Appeal No. 39 of 1942; Bombay
Appeal No. 20 of 1938.b Company—Managing agents—Misconduct of
managing agents whether sufficient to justify
termination of employment—Test—Same prin-
ciple applies as in case of master and servant.

The question whether the misconduct on the part of the employee is sufficient to justify termination of his employment depends in each case on the question whether the misconduct proved, or reasonably apprehended, has such a direct bearing on the employer's business, or on the discharge by the employee of that part of the employer's business in which he is employed, as to seriously affect or to threaten to seriously affect the employer's business or the employee's efficient discharge of his duty to his employer. The nature of the particular business, and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question, but the principle remains the same whether the case is that of a master and servant or that of a company and its managing agents:

c (1886) 17 Q.B.D. 536, *Ref.* [P 18e,f,g]

Where the quarrels between the partners of the firm of managing agents were such as to be detrimental to the interests of the Company the termination of the employment of managing agents would be justified.

[P 18c,d,e]

D. N. Pritt and W. W. K. Page—for Appellants.*Sir Herbert Cunliffe and S. P. Khambatta*

— for Respondents.

Lord Thankerton.—The appellants, who are a merchant firm carrying on business in Bombay, seek to recover damages from the respondents in respect of the alleged wrongful termination of their employment as managing agents of the respondent company.

d By judgment and decree dated 12th October 1938, the High Court of Judicature at Bombay, in its civil appellate jurisdiction, affirmed the judgment and decree of that Court in its original civil jurisdiction, dated 15th February 1938, by which the suit of the appellants was dismissed with costs.

The respondent company is a joint stock company carrying on business at Bombay as spinners and weavers of cotton, jute and other fibres; the individual respondents, along with two other original defendants now deceased, were the directors of the respondent company who passed the resolution, dated 27th January 1933, which terminated the employment of the appellants as managing agents of the respondent company. The respondent company was

formed in 1874, and by cl. 6 of the memorandum of association it was provided as follows:

"That the firm of Morarji Goculdas & Co. of Bombay Merchants or whatever member or members that firm may for the time consist of, shall be the agents of the company, so long as the said firm shall carry on business in Bombay or until they shall resign, and they shall receive a commission of $\frac{1}{4}$ anna per lb. on all the yarns and other material manufactured and sold by the company; should however the company during any one year be unable to declare a dividend of 4 per cent. owing to their profits being less than that amount, the agents shall only be paid one-third of the above commission."

In 1931 important changes were made in the partnership of the appellant firm, out of which arose the troubles which caused the termination of their managing agency. The account of these changes may be conveniently taken from the judgment of the learned Chief Justice:

"The circumstances in which the present plaintiffs were appointed to, or assumed, the position of managing agents of the company are as follows:— In 1930 the Company was in financial difficulties, and a petition to wind up was presented by a creditor. In order to get out of their difficulties, it was essential for the Company to secure further finance, and the usual practice in this country is for finance to be provided for the joint stock companies by their managing agents. So the Company approached Morarji Goculdas & Co., to see whether they could provide the finance. At that time there were three partners in the firm, Ratansey, Tricumdas and Shantikumar. They were not able to provide the money themselves, but they entered into negotiations with two Calcutta firms known as the Jhajharias and Dhandbanias, and eventually it was agreed that these two Calcutta firms should be admitted as partners in the firm of Morarji Goculdas & Co., that they should advance 12 lacs of rupees to the Company, and that they should also be appointed as selling agents of the Company. Those negotiations were completed early in 1931, and on 19th February 1931, three documents were executed, first, an agreement between the existing partners in Morarji Goculdas & Co. of the one part and these two Calcutta firms of the other part, by which the two Calcutta firms were admitted as partners in Morarji Goculdas & Co. I will refer more particularly to that agreement hereafter. Then there was a second agreement, an hypothecation agreement, between the Company and the two Calcutta firms, by which the Calcutta firms agreed to advance 12 lacs of rupees to the Company on certain security, and there was further an agreement between the Company and the Calcutta firms by which the firms were appointed selling agents. There was no actual agreement between the Company and Morarji Goculdas & Co., appointing the new firm of Morarji Goculdas & Co. as managing agents of the Company."

It should be added that under cl. 8 of the first of these agreements, by which the two Calcutta firms were admitted as partners of the appellant firm, it was provided that so long as moneys remained due by the Company to the two Calcutta firms, under the hypothecation agreement, the two Calcutta firms should act as managing partners. It was not long after February 1931, that differences began to arise

a between the Jhajharias, as represented by their principal partner, Ramdhandas, and the Dhandhanias, as represented by their principal partner, Lokenathprasad, and these differences undoubtedly led to the passing of a resolution by the directors of the company, at a board meeting on 27th January 1933, which was in the following terms:

"That the agreement of the employment of Messrs. Morarji Goculdas & Co., as managing agents of the Company and the employment of Messrs. Morarji Goculdas & Co., as managing agents of the Company, be determined."

b On 8th March 1933, the present suit was filed by the appellants in the High Court of Bombay, in which they claimed as relief, in the first instance, declarations of the invalidity of the resolution of 27th January, and of the continued subsistence of their managing agency agreement with the company, and asked for relative injunctions; alternatively, they asked for damages for wrongful termination of their said agreement and employment as managing agents of the company. The alternative claim for damages is the only one now insisted in by the appellants.

c The termination of the appellants' employment was justified by the respondents on the ground of misconduct, and it is clear that the employment of the appellant firm as managing agents not being in dispute, the exact form of the contract of employment or its duration need not be considered, the only issue being whether the appellants were guilty of misconduct sufficient to justify the termination of the contract. In answer to a demand for further particulars, the respondents filed particulars of specific instances of neglect, mismanagement and misconduct in 13 paragraphs. The specific charges have all failed or been withdrawn, and need not be considered; and the question really rests upon the existence of quarrels between the partners of the appellant firm of such a nature and duration as to seriously impair their capacity to discharge their duty to the company as managing agents and to prejudicially affect the interests of the company. On this question the learned trial Judge held, on the evidence, that the quarrels between the partners were such as to be detrimental to the interests of the company and to justify the termination of the employment. On appeal, this finding has been concurred in by the High Court, in its appellate jurisdiction. These concurrent findings of fact were challenged before their Lordships on two familiar grounds, viz., (1) that there was no sufficient evidence to justify the findings, and (2) that the learned Judges had misdirected themselves in law as to the misconduct neces-

sary to justify the termination of the appellant firm's employment as managing agents of the company.

On the first contention, it is sufficient to state that in the opinion of their Lordships there was ample evidence to justify the findings; a perusal of the judgments makes this abundantly clear. The admissions of Ramdhandas would have been sufficient by themselves.

On the second contention, the appellants' main contention, as their Lordships understood it, was that the same principle did not apply to agents in the position of the appellant firm as in the case of master and servant, and that the principles applied in (1886) 17 Q.B.D. 536,¹ did not apply in this case. In the opinion of their Lordships, this involves a wrong approach to the question. In each case the question must be whether the misconduct proved, or reasonably apprehended, has such a direct bearing on the employer's business, or on the discharge by the employee of that part of the employer's business in which he is employed, as to seriously affect or to threaten to seriously affect the employer's business or the employee's efficient discharge of his duty to his employer. The nature of the particular business, and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question, but the principle remains the same, and their Lordships are unable to find that the Courts below, in the present case, have failed to apply the correct principle. Their Lordships, accordingly, are of opinion that the present appeal fails and should be dismissed with costs, and they will humbly advise His Majesty to that effect.

G.N. *Appeal dismissed.*

Solicitors for Appellants — Hy. S. L. Polak & Co.

Solicitors for Respondents — T. L. Wilson & Co. h

1. (1886) 17 Q.B.D. 536 : 54 L. T. 664:55 L.J.Q.B. 306 : 34 W. R. 602 : 51 J.P. 213, *Pearce v. Foster*.

A. I. R. (31) 1944 Privy Council 18

(From Lahore : ('40) 27 A. I. R. 1940 Lah. 515)

22nd November 1943

LORD ATKIN, LORD ROMER AND
SIR GEORGE RANKIN

Mian Saleh Mohammad Shah —
Appellant

v.

Sayyad Zawar Hussain Shah and
another — Respondents.

Privy Council Appeal No. 52 of 1942.

(a) Custom (Punjab)—Riwaj-i-am—Value of.

A riwaj-i-am is prima facie to be regarded as the most accurate and fully considered statement of long-standing custom. [P 20c]

(b) Custom (Punjab) — Succession—Sayyads of Jhang District—Rights of unmarried sisters and daughters, explained.

Under the custom of the Jhang District sister and daughter if unmarried are bracketed with widows and the mother of the deceased. When a daughter marries she may or may not acquire another interest : this will depend on whether there are then collateral male agnates within five degrees; whether her husband is from outside or inside the family ; whether she has sisters married outside or inside the family. If she does acquire an interest as a married woman she takes it as full owner. But until she marries she has only that right as owner which is given to the unmarried woman as suitable to her unmarried condition — an interest which comes to its ordinary and natural termination when she marries, and which does not extend in any case beyond her life. It cannot be said that the unmarried daughter or sister takes an absolute or heritable interest upon which her marriage works a forfeiture. As compared with the right taken by her married sisters — which is described as the right of a full owner and as including full powers of alienation—the unmarried daughter is given a right more suitable to the general situation of an unmarried woman—a prior right extending to the whole estate : a right by which while she remains unmarried she is the owner but a "limited owner." [P 21b,c,e,f]

(c) Custom (Punjab)—Succession — Sayyads of Jhang District — Unmarried sister has no right extending beyond her life nor has she general right to alienate.

In the Jhang District the interest which an unmarried sister gets does not extend beyond her life. She has no general right to alienate and no absolute or heritable interest in any part of the property. [P 21g]

(d) Custom (Punjab)—Succession — Sayyads of Jhang District — Sisters are not preferred unless they have married within fifth or sixth degree.

The riwaj-i-am of Jhang District at question 39 states that daughters and sisters married to male collateral kindred within five or six degrees have preference to those married to remote male collateral relatives or strangers. To question 73 the like proposition is affirmed as regards the sons of daughters : this answer contemplates that the sons of a daughter married in a different caste can succeed if there are no collaterals within the sixth degree. The word "collaterals" in question 79 is not to be taken as meaning "collaterals however remote" but is to be taken with the previous answers, including the answer to question 39, where it is expressly stated that sisters are not preferred unless they have married a collateral within the fifth or sixth degree. Therefore a person whose father is not nearer than the 9th degree cannot claim to succeed in preference to his mother's sister merely on the ground that the latter's husband was not a member of the family. [P 21h; P 22a,b]

D. N. Pritt and R. K. Handoo—for Appellant.

J. M. Pringle — for Respondents.

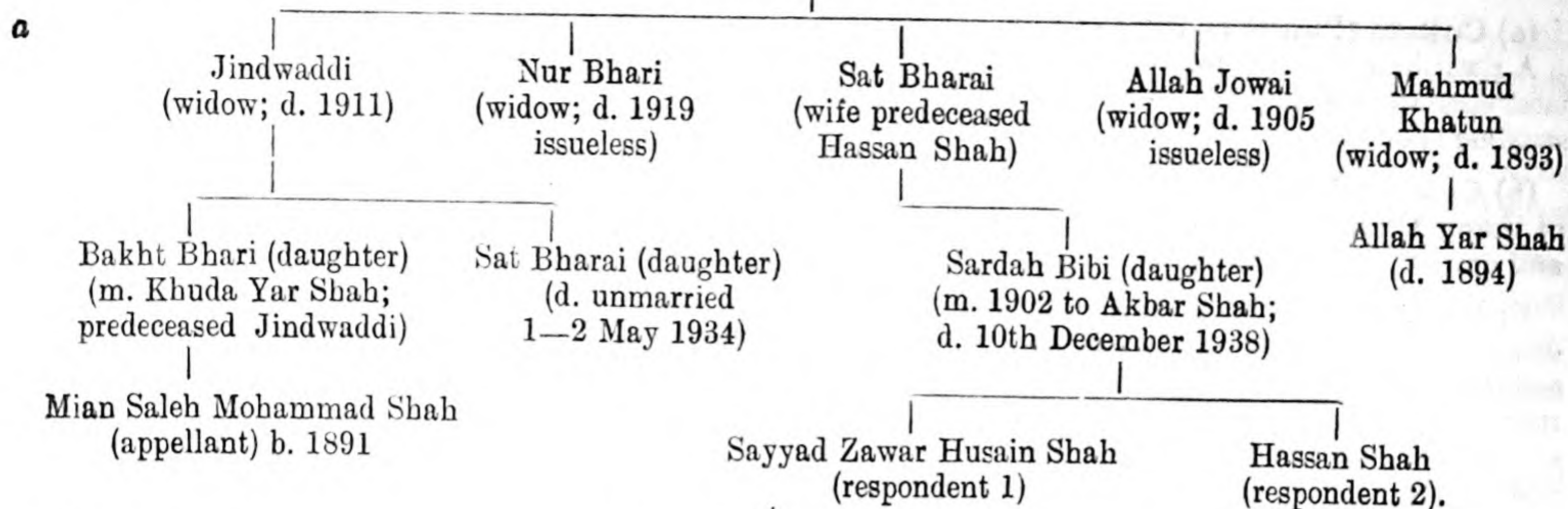
Sir George Rankin. — In this consolidated appeal the question is whether the appellant on the death in 1934 of his mother's

sister, Sat Bharai, became entitled to the whole of certain extensive immovable properties in the Jhang district of the Punjab which had formerly belonged to his maternal grandfather, Hassan Shah, or only to a half-share therein, the other half-share having devolved on Sardar Bibi, the respondents' mother. In 1935 the appellant sued Sardar Bibi on the footing that he was in possession of one half for a declaration that he was entitled to the whole, and in 1936 Sardar Bibi brought a suit against the appellant claiming the whole in like manner. These suits were tried together and on 28th February 1939, the trial Court decided that the appellant was entitled to the whole of the property. Sardar Bibi had in the meantime died and was represented by her sons the two respondents before the board. On appeal the High Court at Lahore by decree of 27th May 1940,* held that the appellant was entitled to a half-share only and the respondents to the other half. Hence this appeal. The appellant relies in the first instance upon a deed of gift dated 1st May 1934, which purports to be a transfer to him by Sat Bharai of the whole of the property. Independently of that deed, he relies upon the admitted fact that the respondents' mother, Sardar Bibi, was married "outside the family" — that is to say, that her husband, the respondents' father, Akbar Shah, was not a member of her father's family. These two grounds of claim have to be justified by the Customary law of the Jhang district applicable to Sayyads.

(see pedigree on page 20)

The property in suit belonged to Hassan Shah, who died in 1893, leaving an only son, four widows and three daughters. One widow (Mahmud Khatun) died a few days after him and his son died in the next year. Nevertheless the son succeeded to the properties and is the person from whom succession must now be traced. One of the three daughters of Hassan was Sardar Bibi whose mother had predeceased Hassan, and in 1895 the properties were recorded in the revenue papers in the names of the three remaining widows and Sardar Bibi. The latter having married in 1902 and Allah Jowai having died in 1905, the properties after some litigation were entered in the names of the two remaining widows Jindwaddi and Nur Bhari. In 1911 Jindwaddi died, having survived her daughter, Bakht Bhari (the appellant's mother), and Jindwaddi's share was recorded in the name of her unmarried daughter Sat Bharai. In 1918 on

* See ('40) 27 A.I.R. 1940 Lah. 515.



the death of the remaining widow Nur Bhari, her share also was recorded as belonging to Sat Bharai who thus came into possession of the whole property. Their Lordships are not called upon to comment on the correctness of these mutations and must not be taken as objecting to any of them. Sat Bharai died unmarried on 2nd May 1934, and the deed of gift by her upon which the appellant relies is dated the previous day.

Many witnesses were called on each side at the trial, but their Lordships are satisfied that the customary law as declared in the *Riwaj-i-am* of the Jhang district must determine the rights of the parties. The evidence adduced in the present case does not in their Lordships' opinion modify or affect the customary rules as revised and restated at the settlement of 1924-1925 and published in English in 1929. This is *prima facie* to be regarded as the most accurate and fully considered statement of long-standing custom. The answers which are important are those to questions 39, 63, 69, 73 and 79.

Question No. 39 (old question No. 1).—(a)—What do you mean by the term "Aulad" for the purpose of succession?

(b) if a man dies leaving a widow or widows, a son or sons, a daughter or daughters, brother and other relatives, upon whom will the succession devolve? State the order of succession.

Answer — All tribes. — (a) The term "Aulad" means the male lineal descendants.

(b) Male lineal descendants have prior claims to inheritance. Qureshi Hashmi residents of village Shorkot state that, in the absence of a male issue in the family, the daughters inherit on the death of their father. The *faqir* Mujawars of Atharan Hazari Tahsil Khang, also state similarly. Other tribes admit that succession in the first place goes to the sons and their direct male lineal descendants, failing them to the widow till death or remarriage, failing widows to unmarried daughters until their marriage, failing these to the collateral descendants of the common male ancestor. In the absence of male collateral kindred within five degrees, daughters, their sons, sisters and their sons succeed in the order given. If the deceased leaves a widow and unmarried daughters from another wife, half the property goes to the widow and half to the daughters. The following tribes profess a different custom :

4. Among Mahomedans those daughters and sisters who are married to male collateral kindred within five or six degrees have a preferential claim to inherit, to the daughters and sisters who have been married to remote male collateral relatives or strangers.

Question No. 63 (old question No. 15).—Do daughters take a share when there are no sons?

Answer — All tribes. — In the absence of sons, daughters succeed until marriage, and when they are married, the collaterals of their deceased father succeed to the property.

Question No. 69 (old question No. 18).—What is the nature of the interest taken by a daughter in the property she inherits? What are her rights of alienation, if any, by sale, gift, mortgage or bequest?

Answer — All Mahomedans. — The general consensus of opinion seems to be that when daughters inherit on account of failure of collaterals within 7 degrees, they have full powers of alienation. In other cases they cannot sell or mortgage except for necessity.

Question No. 73 (old question No. 19). — Do the sons of several daughters share equally or by representation from their mothers?

Answer—All tribes.—After daughters their sons succeed and the sons of several daughters inherit the property of their mothers respectively.

Amongst Mahomedans, sons of those daughters get the share who are married with collaterals within fifth or sixth degree. The sons of those who have been married in different castes cannot succeed except when there are no collaterals within the sixth degree.

Question No. 79 (old question No. 25).—In the presence of sons do sisters inherit? If so, what is their share with reference to daughters? If sisters are excluded by male collaterals, must the latter be within a particular degree or relationship? Do sister's sons (or husbands) ever succeed? If so, how are their share computed?

Answer — All tribes. — In the presence of sons sisters do not inherit. In the absence of male lineal descendants, widows, daughters, mother of deceased and unmarried sisters succeed successively till marriage. Sisters have the same rights as unmarried daughters till their marriage as laid down in answer to question No. 39.

In the absence of collaterals, sisters get their full shares and if they die, their sons succeed by representation to their mothers' share. Among Mahomedans those sisters who have been married to the collaterals of their brothers have prior rights compared with sisters married in different families or castes."

In the cases when inheritance could devolve on sisters, in their absence, sisters' sons succeed to their

a mothers' shares. The husband of a sister, however, is not entitled to succeed in any case.

The first question is whether Sat Bharai as an unmarried sister of Allah Yar Shah had an interest which did not come to an end at her death, or whether she had what in the language of the Hindu law is called the interest of a "limited" owner. It is useful to bear in mind that a right to alienate the property, restricted to occasions of legal necessity or limited by other kinds of restriction, is sometimes attached by custom to the interest of a limited owner. But no question here arises as to the existence of such a right. If her interest terminated with her life the appellant for the purposes of the present case took nothing by Sat Bharai's deed of gift.

It is to be collected from the answers to questions 39 and 79 that Sat Bharai as an unmarried sister succeeded to the property "till marriage" just as an unmarried daughter might have succeeded. Sister and daughter if unmarried are bracketed with widows and the mother of the deceased in the answers to these questions. When a daughter marries she may or may not acquire another interest: this will depend on whether there are then collateral male agnates within five degrees; whether her husband is from outside or inside the family; whether she has sisters married outside or inside the family. If she does acquire an interest as a married woman she takes it as full owner. But until she marries she has, in their Lordships' view, only that right as owner which is given to the unmarried woman as suitable to her unmarried condition—an interest which comes to its ordinary and natural termination when she marries, and which does not extend in any case beyond her life. Their Lordships feel obliged to reject any suggestion that the unmarried daughter or sister takes an absolute or heritable interest upon which her marriage works a forfeiture. That a temporary provision for her while single should come to an end upon her marriage seems reasonable enough, but it is difficult to believe that an absolute interest should be given and then forfeited merely because she marries—especially as collaterals within five degrees exclude her altogether when she marries. That she should be given a preferential position so as to be a fresh stock of descent but only if she dies unmarried: that she should have a right to alienate as she likes but so that her subsequent marriage will forfeit her grantee's estate—these consequences put a strained construction upon the simple provisions of the *riwaj-i-am*. Whereas it is well in accor-

dance with accepted notions that before the estate of the deceased owner can go in absolute right to anyone who is not a male descendant it must provide a limited interest for widows and unmarried women. The remarriage of a widow terminates her interest for reasons not comparable to those which apply when an unmarried daughter marries. But otherwise the interest which they take as such has the same characteristic limit. As compared with the right taken by her married sisters—which is described as the right of a full owner (question 70) and as including full powers of alienation (answer 69)—the unmarried daughter is given a right more suitable to the general situation of an unmarried woman—a prior right extending to the whole estate: a right by which while she remains unmarried she is the owner but a "limited owner."

The first clause of the answer to question 79, as their Lordships read it, deals with unmarried sisters, the second and third with married sisters only. So too in the answer to question 39 (b) "unmarried daughters" and "daughters" are words employed antithetically, and under question 69 the reference to daughters who inherit on account of failure of collaterals within seven degrees is as previous answers show a reference to married daughters. Their Lordships arrive at the same conclusion as Din Mohammad J. and hold that the interest of Sat Bharai did not extend beyond her life. She had no general right to alienate, and no absolute or heritable interest in any part of the property. In this view it becomes unnecessary to consider whether the deed of 1st May 1934 is proved to have been entered into by her with such knowledge and free consent as to be an effective disposition.

The second question is whether the appellant who does not claim that his father Khuda Yar Shah was nearer than the ninth degree to Hassan Shah can claim to succeed on the death of Sat Bharai in preference to his mother's sister, Sardar Bibi, because the latter's husband was not a member of the family. Their Lordships are satisfied that the *riwaj-i-am* gives no countenance to the view that Sardar Bibi was wholly disqualified by such a marriage from succeeding. The observations of the learned Subordinate Judge which compare her position to that of a fallen or degraded woman are as incorrect as they are invidious. The *riwaj-i-am* at question 39 states that daughters and sisters married to male collateral kindred within five or six degrees have preference to those married to remote male collateral relatives or strangers.

a To question 73 the like proposition is affirmed as regards the sons of daughters: this answer contemplates that the sons of a daughter married in a different caste can succeed if there are no collaterals within the sixth degree. Their Lordships agree with the construction put by the High Court on the answer to question 79 and think that the word "collaterals" is not to be taken as meaning "collaterals however remote" but is to be taken with the previous answers, including the answer to question 39, where it is expressly stated that sisters are not preferred unless they have married a collateral within the fifth or sixth degree. It is impossible for the appellant to succeed upon the strength of the evidence called by him upon the meaning of the word "kufv" (family). Apart from the fact that evidence of the same unsatisfactory character has been called in equal if not greater quantity for the respondents, a number of the appellant's own witnesses put him out of Court. It is to be collected from the *riwaj-i-am* that the line of cleavage is somewhere about the sixth degree and it is enough to say that accepting the appellant's own pedigree as put forward by him, their Lordships cannot hold that he has shown any rule of customary law which entitled his mother to be preferred to Sardar Bibi or himself to the respondents.

Their Lordships have already expressed their obligation to Mr. Pritt for a clear and able argument. They will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondents' costs of the appeal.

K.S. *Appeal dismissed.*
Solicitors for Appellant — *Hy. S. L. Polak & Co.*
Solicitors for Respondents — *Hardcastle Sanders & Co.*

d A. I. R. (31) 1944 Privy Council 22
(*From Allahabad*)

24th November 1943

LORD ATKIN, LORD PORTER AND
SIR GEORGE RANKIN

*Chaudhary Paras Ram Singh and
others — Appellants*

v.

*Babu Raja Mohan Manucha and others
— Respondents.*

Privy Council Appeal No. 62 of 1942; Allahabad Appeal No. 19 of 1938.

Mortgage—Mortgage by deposit of title deeds in Delhi in favour of *A* by *B* — Validity of — Subsequent mortgage by *B* to *C* — Title deed stated to be with *A*—No enquiry by *C* from *A*—

C held must be deemed to have had notice of *A*'s mortgage—*A* held entitled to priority.

B who carried on business at Delhi borrowed from *A* a resident of Faizabad Rs. 30,000 upon a pronote and upon the terms that title deeds of property worth Rs. 60,000 would be deposited as security. A title deed to certain land and buildings in Agra was accordingly handed over to *A*'s agent at Delhi and was forwarded by him to *A*. Subsequently *B* mortgaged the aforesaid property to *C* stating in the mortgage bond that he would take back the title deed from *A* and would at once give it to *C*. In the suit by *A* to recover the amount due under the pronote :

Held that (1) the title deed was given to *A* with the intention of creating a security for the loan ;

[P 23g]

(2) the letter by *A*'s agent forwarding the pronote and the title deed to *A* could not be regarded as itself constituting the agreement between borrower and lender namely *B* and *A* ;

[P 23h; P 24a]

(3) as *C* was told that *B* had parted with the title deed to *A* and was thus put on enquiry whether the security offered to him by *B* was offered in fraud of *A* and as *C* did not make any enquiry he must in the circumstances be deemed to have had notice of *A*'s mortgage ;

[P 24c, d]

(4) as the T. P. Act was never applied to Punjab and did not invalidate mortgages made in Delhi by deposit of title deeds *A*'s security must have effect ;

[P 24d]

(5) as *C* had taken at a later date and with notice of *A*'s right *C* had no claim to priority : 9 M. I. A. 303 (P.C.), *Rel. on.*

[P 24d]

T. P. Act —

(43) Chitaley, S. 58 N. 39 Page 1225 Note "The delivery . . . security"; S. 3 N. 29; S. 78 N. 9. (36) Mulla, Page 349 Note "3 Intention;" Page 25 N. "(22) ; Page 26 N. (23) ; Page 204 Note "(2) Successive Transfers."

C. S. Rewcastle and S. P. Khambatta —

for Appellants.

L. M. Jopling — for Respondents.

Sir George Rankin.—The plaint in this case was filed in the Court of the Subordinate Judge at Agra on 11th August 1930, by one Moti Lal Manocha, a banker and money-lender, resident at Faizabad. He died in 1933 and respondents 1 to 4 have been substituted in his stead. He impleaded two sets of defendants. The first set are now respondents 6 to 9, who take no part in this appeal. They include two persons called Rup Narain and his son, Raj Narain, whose acts as borrowers and mortgagors come into question in this case. The other set of defendants are the present appellants sometimes referred to by their family designation as "the Chaudharys." The plaintiff sued to enforce a mortgage made by deposit of a title deed dated 26th February 1863, to certain land and buildings in the city of Agra. He alleged that early in September 1923, Rup Narain and Raj Narain, who carried on business at Delhi, arranged in August 1923, to borrow Rs. 30,000 from him upon a promissory note and upon the terms that title deeds of property worth about Rs. 60,000

^a would be deposited as security. He alleged further that the title deed of 1863 had been handed over as security in Delhi to his brother-in-law, Lakshmi Narain, who was acting on his behalf, together with a promissory note dated 3rd September 1923, carrying interest at 12 per cent. with half-yearly rests and a receipt also dated 3rd September 1923; and that these three documents had been forwarded to himself (the plaintiff) at Faizabad by a letter of 6th September from Lakshmi Narain. The letter (Ex. 4) is as follows :

"Rai Sahib Rup Narain, Bar-at-Law and Magistrate, 1st Class.

Dehli,
6th September, 1923.

My Dear Brother,

^b Herewith the pronote, receipt and the title-deed. This deed is a joint sale-deed of two properties in favour of Lala Ram Chand through whom Mr. Rup Narain has inherited the property. Munshi Gurdial Singh, father of Mr. Rup Narain obtained the succession certificate with regard to this property on 1st September 1863, along with other properties left by L. Ram Chand his uncle. I have seen the original certificate and if you require I will send a certified copy of the same to you. Out of these two houses one has been recently re-built and consists of 6 shops and double storied 'bala-khanas' on them yielding a monthly rent of Rs. 187 net. The present market value of this property is between 60 or 70 thousand rupees. Mr. Rup Narain is placing this one property ^c with you as an additional and collateral security for his pronote of Rs. 30,000. In case he requires this document back any time before the payment of your debt, he will place with you another deed of a property recently acquired by him through a decree of Court. I hope you will find this all in order and satisfactory. Your cheque has been endorsed over by Mr. Rup Narain to the Imperial Bank for collection and no sooner he gets the money he will send you Rs. 1000 your commission.

I really thank you for so promptly complying with my request.

With respects to elders and love to children.

I am your sincerely,

(Sd.) LAKSHMI NARAIN.

[With kind regards.

6th September 1923. (Sd.) Rup Narain.]"

^d The promissory note was renewed on 21st August 1926, for the sum of Rs. 42,000 and the new note was registered by the Sub-Registrar at Delhi. In 1928 insolvency proceedings were begun against Rup Narain which resulted in adjudication in the following year, and on 11th March 1929, a notice requiring payment of Rs. 55,162 as due under the renewed note was served on him by the plaintiff.

The appellants were impleaded as persons who had taken a later mortgage over the property in suit with knowledge of the plaintiff's mortgage and had later still taken a sale-deed. On 12th October 1923, Rup Narain and Raj Narain executed a mortgage bond (Ex. 2) in favour of a wakil at Agra called Pandit Parbhu Dayal in which they recited their

indebtedness to him on hundis to the amount of Rs. 1,25,000 and purported to hypothecate therefor certain properties including the property now in suit, stating in the bond that "the title deeds of this property are with Rai Sahib Babu Moti Lal and hence the same have not been made over to Panditji." On 13th June 1924, Rup Narain and Raj Narain executed a mortgage deed over the same properties in favour of the appellants' predecessors for Rs. 30,000 and interest thereon. This deed recited the previous deed of 12th October 1923, and stated that the sum lent was left with the lender to pay off Pandit Parbhu Dayal in respect of this property pursuant to that deed. It was further recited :

"And the property aforesaid is now free from all sorts of hypothecation lien. I shall take back the former 'asnads' relating to the property from Babu Moti Ram and shall give them at once to Chaudhri Sahibs aforesaid."

Finally, by deed (Ex. Y) dated 1st January 1928, the mortgagors reciting that they had persuaded the appellants' predecessors to purchase the property as the interest was mounting, transferred it to them by way of conditional sale on terms which need not here be detailed.

The trial Judge held that the title deed was not given to the plaintiff with a view to create a security for the loan, that if it was so given no valid security was thereby created, that the plaintiff was only entitled to a money decree against the first set of defendants (now represented by respondents 6 to 9), and that as against the appellants the suit should be dismissed.

The High Court in appeal on 21st April 1938, reversed this decision and gave the plaintiff a preliminary mortgage decree for sale, it not being disputed before them that a mortgage could be created at Delhi by deposit of title deeds. It was contended in the High Court that the letter of Lakshmi Narain to the plaintiff, dated 6th September 1923, was ^e a fabrication, and that the title deed was not enclosed therewith to the plaintiff. This contention was rightly rejected by the learned Judges who point out in their judgment that there is no evidence in support of it and that the oral evidence to the contrary is supported by the documents. Mr. Rewcastle for the appellants disclaimed any contention that the letter was a fabrication and confined himself to questioning whether there was any intention to create a security. Their Lordships however see no room for doubt upon that point. The letter of 6th September 1923, being written by the plaintiff's agent to the plaintiff cannot be regarded as itself constituting the agreement between lender and borrower, ^f

a and their Lordships cannot find that it has at any time been suggested that the security is invalid by reason that the letter was not registered.

What then is the position of the appellants, who took their interest in the property in suit with knowledge that the title deeds were on 12th October 1923, with Moti Lal? It has been suggested that they merely supposed this to mean that the property had been offered to Moti Lal as a prospective purchaser and that he was looking into the title before making up his mind. But this suggestion is without substance even as regards the date 12th October 1923, while in relation to the date June 1924, it is plainly impossible. No lender would have been content to accept it even if it had been solemnly put forward by the borrower. The plaintiff was in business as a money-lender, and to say that he held the deed was much as if the borrower had said that his deeds were with his bank. That a mortgage should have to be executed while a prospective purchaser had got so far as to be looking into the title is not in itself probable; and even if the prospective purchaser could not make up his mind he could return the deed when he had read it, or give a receipt for it to enable the mortgage to go through. Lenders are not uninterested in prospective purchasers from whom they would get their money back immediately. The finding of the High Court that Pandit Parbhu Dayal and the appellants had notice of the plaintiff's mortgage is fully justified. The question is not whether they were negligent in not enquiring whether their borrower had parted with the title deeds. If that had been the only point it would on the facts of this case have required careful consideration. But they were told that he had parted with the deeds to the plaintiff and they made no inquiry of the plaintiff—
d the only person to whom the inquiry could safely or usefully be addressed. They were put on inquiry whether the security offered to them by Rup Narain and Raj Narain was offered in fraud of the plaintiff. This is now shown to be the truth as an inquiry would have at once disclosed. There is no ground for the contention that the title deed of 1863 was not a proper and sufficient deed to be deposited for the purpose of creating a security over the property in suit. As the Transfer of Property Act was never applied to the Punjab and does not invalidate mortgages made in Delhi by deposit of title deeds the plaintiff's security must have effect; and the appellants having taken title at a later date and with notice of the plaintiff's right have no claim to

priority: cf. 9 M. I. A. 303¹ at p. 322-3. It has not been contended that the Registration Act confers priority in such a case and their Lordships find it unnecessary to discuss that statute. They will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of respondents 1 to 4, who are at liberty if necessary to add their costs to their security.

G.N.

Appeal dismissed.

Solicitors for Appellants — T. L. Wilson & Co.

Solicitors for Respondents —

Hy. S. L. Polak & Co.

1. (1861-63) 9 M. I. A. 303 : 1 Sar. 857: 1 Suther. 480 (P. C.), Varden Seth Sam v. Luckpathy Roy-jee Lallah.

A. I. R. (31) 1944 Privy Council 24

(From Allahabad)

13th December 1943

LORD ATKIN, LORD PORTER AND
SIR GEORGE RANKIN

Lachhmi Sewak Sahu — Appellant

v.

Ram Rup Sahu and others—

Respondents.

Privy Council Appeal No. 10 of 1937; Allahabad Appeal No. 33 of 1934.

(a) Appeal—New point—Point of limitation.

A point of limitation is prima facie admissible even in a Court of last resort although it has not been taken in the lower Courts. [P 25f]

Limitation Act —

('42) Chitaley, S. 3, N. 17.

('38) Rustomji, Page 35 Note "Plea of limitation taken for first time in appeal."

(b) Hindu law—Religious endowment—Profits of property to be in charge of settlor and his heirs generation after generation—Successor of right of management takes as heir.

Where a deed of endowment provided that "the profits of the endowed property shall after the payment of the Government revenue be in the charge of me, the executant and my heirs generation after generation:"

Held that after the settlor's death his successors in the right of management would not take as members of a Mitakshara joint family but simply as his heirs might take his separate property as a matter of inheritance. [P 26c]

Hindu Law —

('40) Mulla, Page 487 para. 419.

('38) Mayne, Page 940 para. 808.

(c) Adverse possession—Co-heirs—Right of management of family idol descending by inheritance — Eldest member managing idol's affairs held not adverse to other members.

Until something is done which amounts to an ouster of one of the heirs the possession of one is considered to be the possession of all. Where the right of management of family idol descends by inheritance the fact that the representative of the

a eldest branch should in fact be allowed to see to the debsheba, to collect the income and to defray the proper expenses is very far from being cogent proof of ouster and therefore his possession is not adverse to the other members. [P 26c,d,e,f]

Limitation Act —

('42) Chitaley, Arts. 142, 144 Notes 35, 44.

('38) Rustomji, Page 1479 Note "Co-heirs Adverse Title inter se."

(d) Adverse possession — Question held one of fact.

In the absence of any issue, any cross-examination, any inquiry upon the point, and without giving the plaintiff an opportunity to meet the allegation of adverse possession, the question is only one of fact [P 26e]

Limitation Act —

b ('42) Chitaley, Arts. 142, 144, N. 98.

('38) Rustomji, Page 1374 Pt. 4.

J. M. Parikh and V. K. Krishna Menon —
for Appellant.

W. Wallach — for Respondents.

Sir George Rankin. — This appeal arises out of a partition suit brought on 3rd August 1928, in the Court of the Subordinate Judge of Azamgarh by one Ram Rup son of Ram Narain a Hindu governed by the Mitakshara. Ram Rup, the plaintiff, died in 1936 and is now represented by his son and grandson. At the date of the suit, his father and all his brothers c were dead and he impleaded as defendants 1 to 6 the sons and widows of his brothers. The widow of one brother who had died in 1915 was not impleaded but need not be further mentioned. Defendant 1 is the son of his eldest brother Bhairon and is the appellant before the Board. The plaintiff averred that he and his nephews were members of a joint Hindu family of which Bhairon until his death in 1927, and thereafter the appellant, had been karta. He pleaded that on 4th August 1927 the various members of the family had by a deed dated 4th August 1927 agreed to come to a partition and nominated arbitrators for the d purpose; and that these arbitrators had carried out this work in part though they had not effected any division of the houses, when on 23rd July 1928 they withdrew from their task. The plaintiff joined as defendants certain persons who were alleged to be debtors to the joint family upon allegations which it is no longer necessary to consider. He also included a claim to be one of the managers of a private family idol—Sri Thakurji defendant 10—which was possessed of an 8 annas share in a village called Asni.

The present appellant resisted the suit saying that the family had not been joint since 1916, that the deed of 4th August 1927, which recited that they were joint was fictitious, that the books of account and cash of the family

were with the plaintiff, and that the plaintiff, e was not a "mutwalli" of the endowed property in Asni. Both Courts in India have disbelieved the appellant, have rejected his case and have found in favour of the plaintiff. They have held the deed of 4th August 1927, to be genuine, that the family was at that date joint, that the arbitrators' partition so far as it went was fair and reasonable, and that the appellant is liable to render accounts. They have directed a partition of the houses into five shares — one going to Mt. Manaki, the sonless widow of the plaintiff's brother Bindeshri, as provided in the deed of 4th August 1927. Upon all these matters, Mr. Parikh learned counsel for the f appellant concedes that he cannot press this appeal and their Lordships are only concerned with them so far as to express their opinion that in view of the concurrent findings learned counsel has exercised his discretion very properly.

Upon one point however this appeal has been urged. It is not a point taken at any stage of the proceedings in either of the Indian Courts but, as it is a point of limitation, it is prima facie admissible even in a Court of last resort. It has reference to the claim of the plaintiff to be a "mutawalli" of the property dedicated to Sri Thakurji, and it is founded g upon the fact that in the revenue papers the property was recorded as belonging to Sri Thakurji "under the supervision of Bhairon." On this it is now contended that the plaintiff had been out of possession for a time sufficient to bar him from recovering in this suit of 1928 possession of his share in the office of mutwalli or of his share in the endowed property. On either of these views as to the nature of his claim he would be barred by twelve years adverse possession under Art. 124 or Art. 144 of the schedule to the Limitation Act, 1908 (*Gnanasambanda's case*, 27 I. A. 69¹ at h p. 77).

This part of the plaintiff's claim was put forward in the plaint on the footing that the plaintiff was in possession to the extent of his right—that is, of a one-fifth share; and that he desired a declaration to that effect. The learned Subordinate Judge thought that the proper form of declaration was "that the plaintiff along with others is a mutwalli of Sri Thakurji." The High Court judgment states:

"It is objected on behalf of defendant 1 that since the plaintiff is admittedly out of possession of this property he should have added a prayer in his plaint

1. (1900) 23 Mad. 271 : 27 I. A. 69 : 10 M. L. J. 29 : 7 Sar. 671 (P.C.), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*.

a for consequential relief. It is a fact that the plaintiff is not in possession, but since this is a partition suit and all the parties are before the Court, we are of opinion that under the provisions of O. 41, R. 33, Civil P. C., this Court can and should give to the plaintiff the supplementary relief of possession, this being the only method by which the partition can be given effect to in respect to the endowed property."

By their decree of 23rd August 1934, they modified the trial Court's decree by a direction "that the plaintiff shall be given a decree for joint possession of the endowed property." No suggestion of any difficulty as to limitation appears from the High Court's judgment; the argument about "consequential relief" b being an objection taken on the terms of S. 42, Specific Relief Act, to the grant of a mere declaration.

Neither by his petition of appeal nor by the case lodged on his behalf has the appellant suggested any difficulty on the score of limitation, but in argument his learned counsel drew the attention of the Board to the terms of the endowment. These are to be found in Ex. 3 a deed (waqfnama) dated 28th July 1875; made by Ram Narain the plaintiff's father. By this deed he made a "waqf" of the 8 annas share of mauza Asni for meeting the necessary expenses of a "thakurdwara" situate in c mauza Ghauspur which had been constructed by himself. The deed provided :

"The profits of the endowed property shall after the payment of the Government revenue, be in the charge of me, the executant and my heirs generation after generation."

On this provision learned counsel for the appellant very correctly points out that after the settlor's death his successors in the right of management would not take as members of a Mitakshara joint family but simply as his heirs might take his separate property as a matter of inheritance. When full weight is given to this distinction, it does not appear d to their Lordships to make it possible on this appeal that they should come to a finding that the possession of the plaintiff's eldest brother Bhairon before 1927 had been adverse to the plaintiff. The case is really on the same footing as that common in Bengal of the seabaiti of the family idol descending by inheritance in like manner as secular property under the Dayabhaga. Under that law debutter property and secular property could hardly be treated differently: in the latter case it is clear that until something is done which amounts to an ouster of one of the heirs the possession of one is considered to be the possession of all. That the representative of the eldest branch should in fact be allowed to see to the debsheba to collect the income

and to defray the proper expenses is very far from being cogent proof of ouster. Let it be assumed however that there is some room for doubt as to the limits of the rule as to possession between co-owners. The question whether Bhairon's possession was adverse to the plaintiff is still a question of fact; and, it would be manifestly unjust if it were held, in the absence of any issue, any cross-examination, any inquiry upon the point, and without giving the plaintiff an opportunity to meet the allegation, that the possession of Bhairon and of the appellant had been adverse to the plaintiff for twelve years. Their Lordships are not here concerned to forecast the result, at which a proper inquiry would arrive, but there are important materials to be considered as tending to show that Bhairon's possession of the office of manager of this endowment was not adverse to the plaintiff. The mere facts that the idol was a private family idol, and that this Mitakshara family remained joint, as has now been held, till 1927, the year before suit, make it readily intelligible that the eldest brother who managed the family properties should manage the family idol's affairs. When to this it is added, as the appellant's own evidence would warrant, that Bhairon lived to be a very old man "engrossed g always in his puja" the inference of adverse possession becomes still less plain. The High Court may well have been right in thinking that at the date of the suit or of the hearing the plaintiff was not in possession of any share in the office of manager; the plaintiff had stated that "defendants 1 to 4 deny the plaintiff's rights as mutwalli." But there is nothing in this to suggest that they had denied it twelve years before and ever since, and their Lordships cannot now be asked to hold that the possession of the appellant's father was adverse to the plaintiff. They will humbly advise His Majesty that this appeal should h be dismissed. The appellant must pay the costs of Ram Rup's legal representatives.

K.S.

Appeal dismissed.

Solicitors for Appellant — *Harold Shephard.*

Solicitors for Respondents — *Hy. S. L. Polak & Co.*

a **A. I. R. (31) 1944 Privy Council 27**

(From N.-W. F. P.)

15th November 1943

LORDS ATKIN, ROMER, PORTER AND
CLAUSON AND SIR GEORGE RANKIN*Sardar Abdul Rahman Khan*

— Appellant

v.

Sardar Mohd. Ashraf Khan and others

— Respondents.

Privy Council Appeal No. 29 of 1942.

N.-W. F. P. Muslim Personal Law (Shariat)
Application Act (6 of 1935), S. 2—Effect of Act.

b The effect of the Act is that it has altered the course of succession in so far as to make the ordinary rule of Mahomedan law applicable and to exclude the operation of custom. Where therefore succession opened after the Act came into force, a party cannot rely upon any decision based upon the rule of custom given in his favour before the Act came into force and the succession will be governed by the rule of Mahomedan law. [P 29a]

Sir Thomas Strangman and W. Wallach —
for Appellant.*W. Barton and F. Gahan* — for Respondents.

Lord Clauson. — This is an appeal from a decree of the Court of the Judicial Commissioner, North-West Frontier Province, dated 20th January 1941, which reversed a decree of the Senior Subordinate Judge, Hazara, dated 28th November 1939. The question for decision is as to the devolution, on the death on 8th January 1938, of Mir Abdullah, of the ownership of three villages, Koklia, Dingi and Jhar. It is contended on the one side by Abdul Rahman, the present appellant, eldest son of Abdul Jabbar (who was the eldest son of Mir Abdullah but predeceased his father) that the villages in suit have in the special circumstances of the case devolved on him, while the respondents, Ashraf and Ilahi, two younger sons of Mir Abdullah, and Begum Jan, widow of Mir Abdullah, contend that the villages have devolved upon them as the persons entitled according to the ordinary Muslim law of succession to the property of Mir Abdullah.

In order to clarify the contentions of the parties, their Lordships find it necessary to go back to the year 1871 when Muqaddam Ahmad, the great grandfather in the direct male line of primogeniture of Mir Abdullah was still alive. Muqaddam Ahmad's position in regard to the villages in suit was as follows: he was in possession of the three villages: he was also jagirdar of the three villages, that is to say, he was the beneficiary of the right to receive the land revenue of these three villages without any liability to account to government for it. He died on 27th August 1871, and on his death

litigation took place in the civil Court before Captain Wace, who was not only Judge of the civil Court but was also in fact the Settlement Officer dealing with the settlement of this District. In this litigation Captain Wace on 9th April 1874, delivered an elaborate judgment which dealt at length with the history of the family and resulted in a declaration that the three villages devolved in entirety with the chiefship of the family, and that the member of the family to whom the Government at each succession award the jagir (i.e., the right to receive the land revenue of the three villages) is to be held to be the Chief: and the decree awarded to Mir Ahmad (who was the eldest son of the deceased, and had been appointed jagirdar in succession to his father) those shares of the three villages of which he was not already in possession. From this decision there was an appeal to the Court of the Commissioner of the Division, and that Court, on 23rd October 1874, dismissed the appeal, pointing out that Captain Wace's decision had not been arrived at agreeably to the Mahomedan law, but was based on custom. A further appeal was presented to the Financial Commissioner but was withdrawn. The question before Captain Wace was governed by the Punjab Laws Act, 1872, the following being the relevant sections:

5. In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be—

(1) any custom of any body or class of persons, which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority,

(2) the Mahomedan law, in cases where the parties are Mahomedans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is referred to in the preceding clause of this section.

6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

In argument before their Lordships, it was suggested on behalf of the appellant that the effect of the declaration was not to declare an existing custom, but to decide that the three villages were not the property of Muqaddam Ahmad, but were the endowment of the Chiefship, and fell to be treated as in the nature of property belonging to a corporation sole. It is however to be observed that Captain Wace was bound by law to apply the ordinary Mahomedan law to the question before him, save in so far as it was excluded by the family custom, and his decision cannot

a in their Lordships' view be treated as other than as a finding, whether correct or not, that there was a binding custom in the terms which he states governing the inheritance to the three villages on the death of each successive owner: and the Commissioner's Court on appeal plainly took this view of the judgment. Their Lordships are satisfied that the alternative view suggested on behalf of the appellant is unfounded and that the decision recognizes the three villages as the property of Maquddam Ahmad, though subject by custom to a special rule of inheritance on his death.

b It appears that about this period the jagir, or right to receive the land revenue was transferred from the three villages in suit to other family property at Kot Najibullah and henceforward Mir Ahmad was owner of the three villages subject to liability to pay land revenue, his exemption from land revenue in respect of his jagir existing in respect of the property at Kot Najibullah. There is however no question before their Lordships as to the title to the jagir. The dispute before them is confined to the question of the ownership of the three villages. Mir Ahmad died in 1880, and his eldest son, Ghulam, who was recognized as jagirdar in respect of Kot Najibullah in his father's place, succeeded without contest to the ownership of the three villages. Ghulam died in 1904, and his eldest son, Mir Abdullah, was recognized as jagirdar in his father's place, and he succeeded without contest to the ownership of the three villages.

In or about 1930, Mir Abdullah transferred one of the three villages to the present respondents (his two younger sons and his wife). The validity of this transfer was disputed by his grandson the present appellant, who on 27th February 1934, obtained from the Court of the Senior Subordinate Judge of the District
a a declaration that the three villages appertain to the Chiefship of the family for the time being and that the transfer was void and inoperative as against the interests of that member of the family to whom the Government should award the jagir on the death of Mir Abdullah. This judgment was affirmed on 16th April 1935. This judgment is binding on the parties to the present appeal as *res judicata*, but their Lordships do not propose to examine the grounds of the decision. The question is whether the appellant can rely on that decision to support his present appeal in view of the subsequent action of the Legislature. On 6th December 1935, the Muslim Personal Law (Shariat) Application Act, 1935, came into force. The preamble to that Act declares

it expedient to make provision for the application of Muslim Personal Law (Shariat) in the North-West Frontier Province, and S. 2 enacts as follows:

"2. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts or any religious usage or institution including Wakf (trust and trust property) the rule of decision shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims."

An exception follows which, however, was not suggested to be relevant to the present case. After the law had been thus altered, viz., on 8th January 1938, Mir Abdullah died. The present appellant has been recognized by the Government as succeeding to the jagir, and it is not disputed that he has thus become Chief within the meaning of that term as used in Captain Wace's judgment of 9th April 1874, and no question as to the jagir or the position of the appellant as jagirdar or as Chief is before their Lordships. Nor is it disputed that if the law had remained as it stood before the enactment of the Act of 1935, the appellant as jagirdar and accordingly Chief would, in view of the previous judgments, have had a good title to the three villages, subject however to the payment of land revenue, the jagir having been transferred from the three villages to Kot Najibullah. Further it is not in dispute that if the devolution of the three villages is governed by the Muslim personal law they devolve upon the respondents to the exclusion of the appellant.

The present action was initiated by the present respondents on 7th June 1939. By their plaint they claim that the succession to the three villages is, by reason of the Act of 1935, governed by the Muslim personal law, and that the villages accordingly devolved upon them upon the death of Mir Abdullah. The contrary contention pleaded by the present appellant is that the Act does not govern the matter; he suggests that the three villages were not the property of Mir Abdullah, but that Mir Abdullah possessed the villages by reason of his being Chief. This contention found favour with the Senior Subordinate Judge who on 28th November 1939 dismissed the suit on the ground, as he states in his judgment, that the villages were not the property of Mir Abdullah, but were property appertaining to the chiefship, and that the Chief for the time being is in the position of an amin (trustee) of the property.

The matter came on appeal to the Court of the Judicial Commissioner, and was heard by the Judicial Commissioner, and Kazi Mir Ahmad J. The latter learned Judge delivered

a the judgment of the Court reversing the decision of the Subordinate Judge, and granting the plaintiffs, the present respondents, the declaration sought by them that the villages devolved upon them upon the death of Mir Abdullah. The learned Judges recognised that the rule as to the devolution of the villages laid down by Captain Wace under custom would have governed the case but for the intervention of the Legislature, but they held that the Act had altered the course of succession in so far as to make the ordinary rule of the Mahomedan law applicable, and to exclude the operation of custom. Their Lordships agree with the learned Judges below that this is the clear effect of the Act. The learned Judges dealt with the suggestion that the three villages were not individual property and pointed out that there was no ground whatever to justify it. Here again their Lordships find themselves in agreement with the learned Judges below. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed and that the appellant be ordered to pay the costs of the appeal.

G.N. *Appeal dismissed.*

c Solicitors for Appellant — *Hy. S. L. Polak & Co.*
Solicitors for Respondents — *Peake & Co.*

A. I. R. (31) 1944 Privy Council 29

(*From Allahabad :*

('37) 24 A. I. R. 1937 All. 670)

21st December 1943

LORD ATKIN, LORD PORTER AND

SIR GEORGE RANKIN

Sm. Ashtbhuja Ratan Kuer—Appellant

v.

Thakur Debi Baksh Singh and another
— *Respondents.*

d Privy Council Appeal No. 31 of 1941 ; Allahabad Appeal No. 24 of 1937.

(a) Succession Act (1925), S. 270—Main property in Oudh — Only small portion in Agra — District Court in Agra province held had jurisdiction.

Although the whole of the testator's property was situated within the United Provinces of Agra and Oudh, yet by far the larger and more valuable part of it was in Oudh and only a portion small in quantity and value was situated in Agra :

Held that the District Judge in Agra Province had jurisdiction to grant letters of administration with the will annexed. [P 29f ; P 31e,f]

(b) Succession Act (1925), S. 271—Scope.

Section 271 does not go to jurisdiction but to discretion. [P 31g]

(c) Succession Act (1925), S. 273—"Province." (*Quare*).

1944 K/4b, 5 & 6a

Whether "Province" means merely province of Agra or amalgamated province of Agra and Oudh. [P 31d]

C. S. Rewcastle and R. K. Handoo —

for Appellant.

Respondents Ex parte.

Lord Porter.—This appeal from a decree of the High Court at Allahabad dated 15th April 1937, concerns the genuineness of an alleged will of one Thakur Ambika Bakhsh Singh.

The main questions for determination are : (i) whether on the evidence before the Courts in India the genuineness of the will was established ; (ii) whether the grant of letters of administration *cum testamento annexo* by the District Judge of Benares (which is within the "province" of Agra) is invalid on the ground that although the whole of the testator's property was situated within the United Provinces of Agra and Oudh, yet by far the larger and more valuable part of it was in Oudh and only a portion small in quantity and value was situated in Agra.

On 1st October 1904, the testator is said to have executed in Jaunpur in Agra a will by which he gave successive life interests in his estate of Nanemau to (a) his elder brother's widow ; (b) his own senior wife ; (c) his own junior wife, and thereafter in the events which happened to his posthumous daughter, who is appellant before their Lordships' Board.

The testator is described in the document as being and in fact was Talukdar of Nanemau, District Sultanpur, Oudh.

The will is a lengthy document which sets out firstly his title to the property, secondly his relatives who were living and dead and thirdly his reason for making a will at that time. It then goes on to deal with the succession to his estate in the manner set out above. Its terms are somewhat garrulous and ingenuous but not perhaps, unnatural in a man of the testator's position more particularly as he appears to have been influenced by the death of his brothers, which occurred at a comparatively early age, and by the prognostications of an astrologer who foretold danger to the testator's life in his 35th and 36th year, i.e., about a year after the date of the making of the will. The will concludes in para. 8

"Paragraph No. 8.—I will keep this memorandum of will having enclosed it in an envelope at such a place that after my death no one except the three Thakuranis have access to it and I will write a slip in Hindi giving instructions that whoever may find it should not disclose it but should at once get it posted in some distant post office, and probably she will do so. I have thought of this plan so that there

^a may be no friction among the three Thakuranis and no Thakurain should bring any accusation against another Thakurain that the Talukdar had done this in consultation with her, otherwise it will be a cause of ill-feelings among them. The envelope in which this memorandum will be enclosed will bear an address so that it may be presented before His Excellency the Governor-General of India in Council and His Excellency will be graciously pleased to send it to that officer who will fully take into consideration the conditions laid down herein because I do not know what department should deal with it and which officer is competent to consider over the contents thereof."

The testator died on 13th August 1905, at about the age of 35 or 36, leaving (i) his elder brother's widow, (ii) his own senior widow, ^b (iii) his own junior widow, alive at his death. The appellant, who is the testator's daughter by his junior widow, was born posthumously on 31st October 1905.

After his death someone appears to have carried out certain directions as to the despatch of a will of the testator to the Government of India, since, when the will in dispute was afterwards produced in the manner described later, there was attached to it a memorandum of the Government of the United Provinces addressed to the testator and there was written upon it an endorsement in red ink.

(1) The memorandum is in the following ^c terms:

"REVENUE DEPARTMENT.

Dated, Allahabad, 25th January 1906.

Office Memorandum.

The undersigned is directed to acknowledge the receipt of a document dated 1st October 1904, purporting to be the will of Babu Ambika Bakhsh Singh, Talukadar of Nanemau, Sultanpur District, which has been transferred by the Government of India, Foreign Department, to this government for disposal: and to say that the will should be registered under the Indian Registration Act, 3 of 1877.

(Signed illegible).

Under-Secretary to Government, United Provinces.

To Babu Ambika Bakhsh Singh, Talukadar, Nanemau, District Sultanpur."

(2) The endorsement is as follows: "P. B. R. ^d No. 1036. Received 20th November 1905."

It was suggested in the Courts below that P. B. R. means Persian Branch Register and it is possible that the document which was in "Urdu" was sent to that Register for translation. The Government of India although approached after the issue of the plaint for further information on the matter were unable to supply any, inasmuch as they have destroyed the relevant records for 1905.

The letter, however, is obviously genuine and no doubt as to its authenticity was raised in the Courts in India.

It is not known who sent some will (whether this or other) to the Government of India but the later history of the document is as follows.

One Niaz Ahmad, a mukhtar who had been employed on the estate during the testator's lifetime and after his death continued to act on behalf of his junior widow, kept a locked box, the contents of which are said to have been unknown, until he left the service and the estate in 1919. About a year after his departure, one Raj Narain who had been appointed to succeed him opened the box in the presence of the junior widow and others on receiving information (as he alleged) that Niaz Ahmad had died. In the box was found the will and letter and both were handed to the junior widow, who shortly afterwards presented the will for registration to the sub-^f registrar at Jaunpur.

The sub-registrar accepted the will for registration under R. 41 (2) and held that, as the senior widow was dead, the junior was competent to produce the will under S. 40, Registration Act. Accordingly the will was registered on 20th January 1920.

On 11th April 1929, the appellant as posthumous daughter and residuary legatee of the testator and as his heir presented a petition in the Court of the District Judge of Benares under S. 232, Succession Act, 1925, for letters of administration with copy of the will annexed. In her petition she stated (as the ^g fact was) that the testator had not appointed any executor, that those who were appointed life owners or managers had taken no steps to obtain probate or letters of administration, that the testator's elder brother's widow had relinquished her rights in favour of the testator's senior widow, that the latter had died in 1908 and that the junior widow was in possession of the testator's estate.

Objections to this petition were filed by a number of persons but only those of Debi Baksh Singh and Lal Bhupendra Narain Singh dated 14th December 1929 and 18th January 1930, respectively, are now relevant, the others ^h having been withdrawn. Debi Baksh Singh claimed to be a "near reversioner" and contended that: (a) the Court of the District Judge of Benares had no jurisdiction to entertain the petition as all the property of the testator was situate in the province of Oudh; (b) the will was a forged document; (c) the registration at Jaunpur was invalid and being unregistered the will was not admissible in evidence.

Lal Bhupendra Narain Singh said that under the will he (and not the appellant) as son of the testator's brother's daughter was the sole residuary legatee and was the person best entitled to the grant of letters of administration but he also questioned the jurisdiction of

a the Court and reserved the right to object to the will on account of certain alterations therein. The last point was disposed of by the District Judge who found that the alterations were made before the testator signed the document. It was not persisted in before the High Court in India, and need not be further considered. On 4th December 1930, however, the learned District Judge framed two preliminary issues dealing with this question of jurisdiction, viz :

(1) Has the Court jurisdiction to hear this petition.

(2) If it has, should it exercise its discretion under S. 271, Succession Act, and refuse to entertain the case.

b To the first of these questions the learned District Judge answered "Yes" and to the latter "No." That he had jurisdiction appears to their Lordships plain. Under the terms of S. 270, Succession Act, 1925,

"Letters of administration to the estate of a deceased person may be granted by a District Judge if it appears . . . that the testator or intestate, as the case may be, at the time of his decease had a fixed place of abode or any property moveable or immoveable within the jurisdiction of the Judge."

c Acting upon this provision the learned District Judge decided that inasmuch as some of the property of the testator even though of very small value was admittedly situate in the Jaunpur District at the time of the hearing and property of a greater value at the time of the death, the Court had jurisdiction to hear the petition. Accordingly a decree was eventually passed in the words "It is ordered and decreed that letters of administration with a copy of the will annexed be granted to the petitioner." It is to be observed that this decree does not state over what property or estate it was to have effect. Nor need it do so. Section 273, Succession Act, makes the necessary provision, when it enacts that "Probate or letters of administration shall have effect over all the property and estate moveable or immovable of the deceased throughout the Province in which the same is or are granted."

d It was, it is true, argued on behalf of the petitioner that "Province" in this section was not confined to the Province of Agra, but, since the passing of Act 7 of 1902, meant the amalgamated Provinces of Oudh and Agra. The District Judge accepted this view. The High Court on the other hand held that the District Judge of Benares was wrong and the decree was bad because the grant was not in terms limited to the property situate in the Province of Agra but was absolute. No doubt the learned District Judge did take the view that the grant extended over the United Provinces but he has not made a decree to that effect—he has merely worded it in general

terms so that it takes effect only over the estate in the province in which the grant was made, whatever that province and that estate may be.

In considering the various issues involved their Lordships have not had the assistance of any case or argument on behalf of the respondents and in their opinion it would, in these circumstances, be undesirable to express any opinion upon a point obviously of difficulty and importance. They will only say that for the reasons they have given, the Court had jurisdiction and leave the decision as to the property over which the grant had effect to an occasion when it is necessary to decide that point. Nor do their Lordships think that the grant was made without jurisdiction because the learned District Judge did not limit the grant to the property within his own jurisdiction. It is true that S. 271, Succession Act, enacts that :

"When the application is made to the Judge of a district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if, in his judgment it could be disposed of more justly or more conveniently in another district or, where the application is for letters of administration to grant them absolutely or limited to property within his own jurisdiction."

This provision however does not go to jurisdiction but to discretion. In the present case the genuineness of a will was in dispute and in order to resolve it witnesses had to be called and the documents produced. In their Lordships' view the District Judge had ample evidence upon which to decide that it was proper to hear the petition and to grant the letters of administration absolutely. In so doing he has considered the matter both on the footing that the grant would have effect over all the property both in Agra and Oudh and also upon the footing that it would have effect over the property in Agra only. In either case he decided to exercise his discretion in favour of making the grant. Their Lordships think that he had material before him upon which he could properly so exercise his discretion and that there is no reason for interfering with it.

If as their Lordships think the learned District Judge had jurisdiction and was justified in using his discretion as he did there remains the further question whether he was right in finding, as in fact he found, that the will was a genuine one. The High Court came to the conclusion that he was wrong and no doubt there are certain elements which require careful scrutiny and give rise to some suspicion. It is clear that the daughter, who would lose the

- a inheritance of the taluqdari property unless it were devised to her, was interested in the production of a will. It could not be established what will was sent to the Government of India after the testator's death in 1905 or who sent it, nor is it clear who received the letter and will in 1906. The testator employed the clerk to a local vakil in Jaunpur instead of obtaining the services of some well-known vakil in Oudh where most of the property was. The will was not registered within one month of its execution, as is required by s. 13, Oudh Estates Act of 1869, though not in respect of Agra, and was found in an unexpected place.
- b Further, when it was registered in Jaunpur, no steps were taken to bring it to the attention of the Deputy Commissioner or the Manager of the Court of Wards which was in control of the estate from 1909 to 1925. All these are matters for serious consideration, but in the first place it was common ground both before the District Judge and before the High Court that the letter from the Secretariat in 1906 is a genuine document. Some will was therefore sent to the Government of India in 1905 and passed on by it to the Local Government. Moreover, the will itself which was in Urdu appears to have been transmitted
- c to P. B. R. which as was suggested may well mean that it reached the Persian Branch Registry for the purpose of translation.

This action is in accordance with the instructions contained in the will itself and is what would be expected if the document sent was the disputed will. That some person or persons should risk forging a fresh will when the genuine one had already reached a government department, and though that department might well have retained a copy of it, seems unlikely. Moreover, the elaborate and somewhat ingenuous terms of the will itself do not suggest the work of a forger. Nor do

d their Lordships think that the evidence of the attesting witness or to a less degree that of the two persons alleged to have been present at the signing should be put aside as of little or no value. The only attesting witness who was still alive was called, and the learned District Judge who saw all these witnesses accepted their evidence. Had the property been in the possession of someone other than those specified in the will at the time of its finding or before the petition was launched, much might have been made of the delay and failure to notify the Court of Wards, but as it was, for the moment at any rate the terms of the will made no change and there was no urgency to take any step.

The High Court seem to have been much

impressed by the fact that Raj Narain who e alleged that he had found the will in the box originally stated that his predecessor Niaz Ahmad had died in 1919, whereas afterwards it was established that the death occurred in 1927. The witness was recalled at a later stage, and corrected his evidence by saying that he heard Niaz Ahmad died in 1919. In the circumstances their Lordships cannot regard this mistake as a vital one. To them as to the learned District Judge, who saw the witness, it does not appear unnatural that he should have acted on hearsay and believed his predecessor to have died at the earlier date.

Having regard to the contents of this will, f the apparent compliance with them by the sending of it to the Government of India and the evidence of a witness to the will and eye-witnesses of its signature accepted by the learned District Judge, their Lordships think the better opinion is that the will is a genuine one and should be affirmed. They accordingly will humbly advise His Majesty that the appeal should be allowed, the judgment of the High Court set aside, that of the District Judge affirmed, and letters of administration granted in the terms of the decree of 19th May 1933. The respondents must pay the costs of the appellant in the High Court and before their g Lordships' Board.

R.K.

Appeal allowed.

Solicitors for Appellant — *Hy S. L. Polak & Co.*
Respondents *Ex parte.*

A. I. R. (31) 1944 Privy Council 32

(From Bombay)

30th November 1943

LORDS ATKIN, PORTER AND CLAUSON
AND SIR GEORGE RANKIN

Sheth Maneklal Mansukhbhai —

Appellant h

v.

Sheth Chimanlal Kalidas and others —
Respondents.

Privy Council Appeal No. 48 of 1940.

Privy Council—Case heard *ex parte*—Grounds on which rehearing may be granted indicated.

In a case which has been heard *ex parte* the Board would be willing to give an opportunity to a party of being heard again if he shows that the case had been heard *ex parte* without any fault on his part and satisfies the Board that he could have put before them some considerations which might have affected their decision. Where the High Court in India after going carefully into all the arguments, adopted one construction, and the Board on appeal had given a detailed *ex parte* judgment in which they had dealt with the points taken by the High Court and had come to an opposite conclusion and it was not suggested that there was anything which could be said to the Board

a if they did grant a further hearing, which had not been considered by the Board in giving their judgment on the previous hearing, it was held that the application for rehearing should be refused.

[P 33a,b,c]

C. P. C. —

(’44) Chitaley, S. 112 N. 9; O. 45 R. 8 N. 3.

(’41) Mulla, Page 1216 Note “Notice.”

Sir Thomas Strangman and R. T. J. Gibson —
for Appellant.

J. M. Parikh and V. K. Krishna Menon —
for Respondents.

b **Lord Atkin.**— Their Lordships are unable to grant this application. They have, and always would have, every consideration for an applicant who came and said that, without any fault on his part, the case had been heard *ex parte*, and, wherever he could satisfy their Lordships that he could have put before them some considerations which might have affected their decision, they would no doubt, be willing to give him an opportunity of being heard again; but the present case is a case which turns upon construction and upon construction only. The High Court from which there was the appeal after going carefully into all the arguments, adopted one construction, and the Board had given a detailed judgment in which they had dealt with the points taken by the High Court and c had come to an opposite conclusion. It is not suggested that there is anything which could be said to the Board, if they did grant a further hearing, which had not been considered by the Board in giving their judgment on the previous hearing. In those circumstances it seems to their Lordships that it would be improper to cause the parties to have another hearing which could only have exactly the same result. Therefore, their Lordships will humbly advise His Majesty that this application should be refused with costs.

G.N. *Application refused.*

d Solicitors for Appellant — *Lattey & Dawe.*
Solicitors for Respondents — *H. Shephard.*

*** A. I. R. (31) 1944 Privy Council 33

(*From Allahabad: (’39) 26 A. I. R. 1939 All. 280*)

13th December 1943

VISCOUNT SANKEY, LORDS ATKIN,
PORTER AND CLAUSON AND
SIR GEORGE RANKIN

Martin & Co. and another — Appellants
v.

Syed Faiyaz Husain and others —
Respondents.

Privy Council Appeal No. 60 of 1942, Allahabad Appeals Nos. 11 and 21 of 1939.

e **Highway—Rights of members of public to user of—Rights of Shia Muslims to carry tazias in procession through public streets—Nature of —Licensee company authorised under Electricity Act to place electric wires at height of 20 feet on public streets—Shia Muslims cannot carry through streets tazias of greater height—Applicability and effect of S. 19, Electricity Act: I. L. R. (1939) All. 237=(’39) 26 A. I. R. 1939 All. 280=181 I.C. 964, *REVERSED*.

The members of the public have a right to take part in religious processions in the streets; subject of course to the rights of other members of the public to pass and repass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and preventing disturbance. This right as a normal user of the highway does not originate in custom. The rights of the Shia Mahomedans to take out in procession tazias through the public streets f therefore are no more and no less than the rights of any member of the public, and subject to questions of danger or disorder there is no reason why a member of the public should not convey along an open street as part of a normal use of the street articles of any height. But as the rights of the Shias are those of the public, so where public rights may lawfully be abridged so may the rights of the Shias. When the Electric Company has been granted a licence under the Electricity Act to supply electricity to a town and has been given the right to place the electric wires at a height of 20 feet on the public streets under the statutory authority of the Electricity Act, the Electric Company must be taken to have been given the power to abridge the public right to carry through the streets objects of a greater height and the Shia Muslims would have no right to carry tazias along g the public street of a height greater than 20 feet. Section 19, Electricity Act, requires the licensee to exercise the powers given to him (in this case the power to place wires 20 feet above the street) causing as little damage as may be: but it gives no right to have the lawful exercise of the power restrained even if it necessarily caused inconvenience: Section 19, Electricity Act, in no case has any reference to compensation for damage, detriment or inconvenience to public rights: (’25) 12 A. I. R. 1925 P. C. 36, *Ref.*; I. L. R. (1939) All. 237 = (’39) 26 A. I. R. 1939 All. 280=181 I.C. 964, *REVERSED*. [P 34h; P35a,b,c]

Sir Thomas Strangman, W. W. K. Page and J. M. Pringle — for Appellants.

Respondents Ex parte.

h **Lord Atkin.** — These are consolidated appeals from a judgment of the High Court at Allahabad reversing a judgment of the Munsif at Amroha in the district of Moradabad. Their Lordships have not had the advantage of hearing counsel for the respondents: but they have been able to consider the careful judgments in the respondents’ favour given in the High Court. The plaintiffs are Shiah Mahomedans of the township of Amroha, and like other Shiahs on the tenth day of the Mahomedan month of Moharram they commemorate the death of Husain, a son of Fatimah, the daughter of Mohammed, by passing in a procession along the streets of Amroha. In the procession are carried “tazias” reproductions of the mausoleum of Husain,

a constructed of wood, paper and tinsil, borne on the shoulders of carriers. They are of various heights and have in some instances reached the height of 27, 30, or more feet from the ground. In 1929, Martin & Co., defendants 3, obtained from the Local Government, pursuant to the Electricity Act 9 of 1910, a licence to supply electricity to the Municipality of Amroha. The licence was soon after transferred to the Upper Ganges Valley Electric Supply Co., Ltd., of which company Martin & Co. became managing agents. The scheme for the supply of electricity involved placing electric wires across the streets in

b Amroha, a matter which is dealt with by S. 13, Electricity Act. It is only necessary to say that all the provisions of the Act were complied with, due notices were given as required by the Act, the approval of the municipality and the Local Government was obtained, and in due course the company became authorised under the Act to place their wires across the streets at a height not less than 20 feet. The respondents had full notice throughout of the proposals, and exercised their rights to object, but their objections after being considered were put aside by the authorities acting no doubt on their view of the general

c interests of the public.

In June 1930, representatives of the present plaintiffs brought a suit against the Municipal Board and Martin and Co. to restrain them from permitting the wires to interfere with the free passage of their tazias. At this time the wires had not been energised, and for the procession of that year a compromise was arranged by which the wires were either lifted or taken down. Immediately after the procession in June 1930 the wires were replaced, and in October 1930, the Local Government by its proper officer authorised them to be energised. In November 1930, the plaintiffs insti-

d tuted the present suit claiming a declaration that by old custom they had a right to take out in procession tazias to the height of 27 feet, and an injunction ordering the defendants to raise the electric wires to such a height as not to obstruct the passage of the tazias in procession. The case in the Court of the Munsif appears to have been fought on the issue of custom. The learned Judge settled issues as to the existence of the alleged custom, and also as to whether, as alleged, according to the Shia religion the taking out of tazias in procession is a necessity, and whether under the Shia religion the reduction of the height of a tazia is not permissible. He found that the evidence was insufficient to establish the alleged custom, and founding himself upon

authoritative evidence produced by the plaintiffs themselves he answered both the questions mentioned above in the negative. Finding, therefore, that the custom on which the plaintiffs based their case was not proved, he dismissed the suit.

On appeal Iqbal Ahmad J., as he then was, considered that the case did not depend upon custom, though apparently he was of opinion that the alleged custom was proved. But founding himself upon a decision of this Board in 52 I. A. 61,¹ that in India there was a right to conduct a religious procession "with its appropriate observances" through the public streets, and being of opinion that to carry tazias of the height claimed was an appropriate observance he came to the conclusion that the plaintiffs had established their right. It remained, however, to consider the defence that the acts complained of had been done under statutory authority, a defence which seems to have been seriously argued for the first time on appeal. The learned Judge was of opinion that S. 19, Electricity Act, applied to the plaintiffs' case:

"(1) A licensee shall in exercise of any of the powers conferred by or under this Act cause as little damage detriment and inconvenience as may be, and shall make full compensation for any damage detriment or inconvenience caused by him or by anyone employed by him."

The effect of this section was to make the exercise of the powers of the company conditional on their not interfering with the rights of others; and as the plaintiffs had the right to carry tazias of the height claimed, they were entitled to the declaration and injunction asked for, subject to the rights of the Magistrate to give orders under S. 144, Criminal P. C. Bajpai J. in substance agreed.

Their Lordships are unable to accept the reasons given by the learned Judges. They agree that it is unnecessary to consider the question of custom. The plaintiffs have the right as members of the public to take part in religious processions in the streets: subject of course to the rights of other members of the public to pass and repass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and preventing disturbance. This right as a normal user of the highway does not originate in custom. Whether a highway could be dedicated subject to such a custom need not be considered. It is not alleged in the present case, and it is difficult to see how such a situation could arise. The rights of the plaintiffs

1. ('25) 12 A. I. R. 1925 P. C. 36 : 86 I.C. 236 : 47 All. 151 : 52 I. A. 61 (P. C.), *Manzur Hasan v. Muhammed Zaman*.

therefore are no more and no less than the rights of any member of the public, and subject to questions of danger or disorder there seems no reason why a member of the public should not convey along an open street as part of a normal use of the street articles of any height. But as the plaintiffs' rights are those of the public, so where public rights may lawfully be abridged, so may the plaintiffs'. It is unnecessary in this case to discuss the effect of the United Provinces Municipalities Act, 1916, which by S. 116 (g) vests the streets in the Municipal Board. For, in the present case, the company derive their rights to place the wires at a height of 20 feet under the statutory authority of the Electricity Act: and clearly therefore are given the power to abridge the public right to carry through the streets objects of a greater height. The plaintiffs therefore have had their rights modified in favour of other rights which the authorities acting under the authority of the statute have considered to be to the greater advantage of the public. In their Lordships' judgment S. 19, Electricity Act, has no bearing on the plaintiffs' claim. That section requires the licensee to exercise the powers given to him (in this case the power to place wires 20 feet above the street) causing as little damage as may be: it would give no right to have the lawful exercise of the power restrained even if it necessarily caused inconvenience: the remaining part of the section appears to be an ordinary provision for compensation for injurious affection. But in no case has it any reference to compensation for damage detriment or inconvenience to public rights such as the plaintiffs'. If any such claim could be made, it would have to conform to the provisions of S. 91, Civil P. C., and be made with the consent of the Advocate-General. In the present case for the reasons given no such claim could be made.

Their Lordships in leaving the case wish to emphasize that no question arises of ignoring or depreciating the respect due to the well established religious beliefs and observances of the plaintiffs. Like any other religious or secular body or any other member of the public their rights over the streets are subject to the present law which may abridge them. In the particular case their objections were obviously carefully considered and were overruled. The legal rights which flow from the decision of the authorities to grant the licence in question are indisputable. For the reasons given, their Lordships will humbly advise His Majesty that the appeal be allowed and the decree of the learned Munsif restored. The

plaintiff-respondents must pay the separate costs of the appellants in both appeals before the Board and in the High Court.

G.N.

Appeal allowed.

Solicitors for Appellants — *Sanderson Lee & Co.*
and Solicitor, India Office.

Respondents Ex parte.

A. I. R. (31) 1944 Privy Council 35

(From Oudh : ('38) 25 A. I. R.
1938 Oudh 107)

21st December 1943

LORD ATKIN, LORD PORTER AND
SIR GEORGE RANKIN

Thakur Raghuraj Singh — Appellant

v.

*Lala Hari Kishan Das and another —
Respondents.*

Privy Council Appeal No. 12 of 1940, Oudh
Appeal No. 5 of 1938.

(a) U. P. Agriculturists' Relief Act (27 of 1934), Ss. 5 and 30—Applicability of S. 5—Suit to enforce simple mortgage — Compromise decree—Final decree for sale passed—Decretal money to be paid by execution of sale deed in respect of certain villages with a condition of repurchase — Decree held was final decree for sale and came within S. 5 — Mortgagor held entitled to relief under Ss. 5 and 30: 14 Luck. 13=('38) 25 A. I. R. 1938 Oudh 107=173 I. C. 865, *REVERSED*.

It is not correct to say that the four kinds of decrees referred to in S. 5 namely a decree for money, a preliminary decree for sale, a preliminary decree for foreclosure and a final decree for sale which has not been fully satisfied have a common feature of providing for payment of money by the judgment-debtor to the decree-holder and therefore S. 5 is meant to apply only to such decrees as contain a direction for payment of money because in a final decree for sale when property is sold by public auction the money is paid into Court; if the creditor is allowed to bid the price is set off: 14 Luck. 13=('38) 25 A. I. R. 1938 Oudh 107=173 I. C. 865, *REVERSED*. [P 38b,c,g]

In a suit to enforce a simple mortgage the compromise decree declared the amount due and ordered that the said amount should be paid with interest in the manner provided in the compromise which formed part of the decree. In the compromise it was provided that a final decree for sale as sought for may be passed in favour of the plaintiff against the defendant. The compromise further provided that as to the satisfaction of the decree money the defendant shall execute in favour of the plaintiff a sale deed in respect of villages to be selected by the plaintiff which will be sufficient to satisfy the decree money and within a week complete the sale deed and that the sale deed should be absolute but that after five years the defendant was to have the right to take back the property on payment of the stipulated price: and a provision that the price should be fixed at a capital sum on which the net profit of the villages shall return $4\frac{1}{2}$ per cent. The Chief Court of Oudh held that as the decree contained no direction for payment of money the Act did not apply and the mortgagor was not entitled to any relief. On appeal to the Privy Council:

a Held that (1) the decree was a final decree for sale. The position was that in a suit in which the plaintiff was entitled to a preliminary decree for sale followed by a final decree for sale the parties agreed to forego any preliminary decree. This could not invalidate the final decree. If the parties had not come to terms the final decree might have given the creditor the right to bid, and if his bid was accepted the price to be paid by him would be set off against the debt. There was no reason at all why the parties should not dispense with these forms and arrange that the sale should be direct by the debtor to the creditor: and as part of the transaction agree for a condition of repurchase. The sale was still a sale by decree of the Court: and the debtor in the last resort was under the compulsion of the Court. The decree thus being a decree for sale came within the purview of S. 5 of the Act and the mortgagor was entitled to relief under that section: 14 Luck. 13=(38) 25 A. I. R. 1938 Oudh 107 = 173 I. C. 865, *REVERSED*. [P 38f,g]

(2) the mortgagor judgment-debtor was entitled to the right given him by O. 34, R. 5, Civil P. C., within 30 days of the sale to bring the whole sum due into Court and put an end to the sale. [P 38g,h]

(3) the fact that the grant of relief under S. 5 would have the effect of allowing the judgment-debtor mortgagor to resile from his agreement under which he agreed to pay the decretal amount by executing a deed of sale in favour of the mortgagee was no ground for refusing relief under S. 5 as the object of the Act like all Relief Acts was to give relief from agreements made by the applicants whether under the laws relating to usury or otherwise, and therefore it could not in ordinary circumstances be an objection to relief that the applicant was seeking to resile from the very agreement against which the law had expressly said he may be relieved: 14 Luck. 13=(38) 25 A. I. R. 1938 Oudh 107=173 I. C. 865, *REVERSED*. [P 38h; P 39a,b]

(4) as the decree was a decree "passed on the basis of a loan" the right to relief under S. 30 was indisputable: 14 Luck. 13=(38) 25 A. I. R. 1938 Oudh 107=173 I. C. 865, *REVERSED*. [P 38h]

C. P. C. —

(44) Chitaley, O. 34, R. 4, N. 15; R. 5, N. 5; N. 13, N. 14.

(41) Mulla, Page 1078, Note "Award and consent decree"; Page 1081, Note "Consent instalments"; Page 1082, Note "Payment into Court."

d (b) U. P. Agriculturists' Relief Act (27 of 1934), S. 5—Exercise of discretion under S. 5—Interference with is more appropriate in appeal than in revision.

Interference with the lower Court's exercise of discretion in granting relief to the judgment-debtor under S. 5 (by granting instalments) is more appropriate to appeal than in revision. [P 39a]

C. P. C. —

(44) Chitaley, S. 115, N. 20.

(41) Mulla Page, 427, Note "No revision orders."

C. S. Rewcastle and A. G. P. Pullan —

for Appellant.

Sir Thomas Strangman and C. Bagram —

for Respondents.

Lord Atkin.— This is an appeal from a decree of the Chief Court of Oudh at Lucknow setting aside a decree of the Subordinate

Judge, Sitapur, which under the provisions of ss. 5 and 30, U. P. Agriculturists' Relief Act, 27 of 1934, amended a compromise decree, dated 4th July 1933, made in a suit in which respondent 1 was the plaintiff and the present appellant's predecessor in title was the defendant. Thakur Raghuraj Singh, hereinafter called the debtor, who is now deceased and represented by the present appellant was the talukadar of a large property in the District of Sitapur. On 17th February 1928, he borrowed from respondent 1 (hereinafter called the creditor) a sum of Rs. 1,40,000 at 10 per cent. compound interest with six monthly rests on the security of six named villages. On 25th October 1931, he borrowed from the creditor a further sum of Rs. 1,53,000 at 12 per cent. compound interest with six monthly rests on the security of the former six villages and nine additional villages. The date of repayment of both loans was 17th February 1933.

On 25th April 1933, the plaintiff commenced the suit out of which the present proceedings arise. It was an ordinary mortgage suit claiming a decree for payment of Rs. 3,88,300 the amount then due to the mortgagees, on default of payment sale of the mortgaged properties, and liberty to apply for the recovery of any balance after sale. The suit does not appear to have been contested; the parties arrived at a compromise agreement to be enforced by a decree, and on 4th July 1933, the decree was made by the Subordinate Judge. As amended by the Chief Court it is as follows:

"Civil side decree for sale under the terms of compromise (O. 34, R. 4, Act V of 1908 where the Court declares the amount due).

IN THE COURT OF THE SUBORDINATE JUDGE, SITAPUR.

Suit No. 27 of 1933.

Rai Bahadur Lala Hari Kisbandas,
son of Lala Gobind Prasad, Khun-
khunji Road, Lucknow ... *Plaintiff,*

versus

1. Thakur Raghuraj Singh, son of Thakur Baldeo Singh, resident and Taluqdar of Kanmau and Sita Rasoin, District Sitapur,
2. Thakur Sheo Ganga Bakhsh Singh, son of Sheo Dan Singh, resident and Zamindar of Bilahri, pargana Mahmudabad, District Sitapur ... *Defendants.*

Claim.—To recover Rs. 3,88,300-2-6 by sale of the mortgaged property under mortgage deeds dated 17th February 1928 and 25th October 1931. Valuation for jurisdiction of the Court and court-fees is rupees 3,88,300-2-6 on which a court-fee of Rs. 4500 has been paid.

This suit coming on this day of 4th July 1933, in the presence of Babu Bishambhar Dass, advocate for the plaintiff, and of Pandit Raj Narain, advocate for defendant 1, and defendant 2 in person.

^a 1. It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this 4th day of July 1933, is the sum of Rs. 3,88,300-2-6 for principal, the sum of Rs. 9648-11-11 for interest on the said principal, and the sum of Rs. 5523 for the costs of the suit awarded to the plaintiff, making in all the sum of Rs. 4,03,471-14-5 with future interest at 0-8-0 per cent. per month from 5th July 1933, till payment.

2. And it is hereby ordered and decreed as follows:

That the said amount with interest be paid in the manner provided in the compromise which forms part of this decree."

After a schedule of the mortgaged properties "given under my hand and the seal of the Court this 4th day of July 1933" :—

^b "Translation of copy of compromise filed by the parties in case No. 27 of 1933, decided on 4th July 1933.

Rai Bahadur Lala Hari Kishan Das ... Plaintiff
versus

1. Thakur Raghuraj Singh Saheb }
2. Thakur Sheo Ganga Bakhsh } Defendants
Singh.

Sheweth,

That in the above case the parties have come to terms as follows :

1. That a final decree for sale, as sought for, for Rs. 3,88,300-2-6 with future interest from the date of suit up to this date at the contractual rate and thereafter at the rate of 8 annas per cent. per month and for costs of the suit may be passed in favour of the plaintiff against the defendants.

^c 2. That as to the satisfaction of the decree-money of the said decree it has been settled that out of the mortgaged property defendant 1 shall execute in favour of the plaintiff a sale deed in respect of some villages which will be selected by the plaintiff, which will be free and clear from all defects, alienations and attachment and which will be sufficient to satisfy the decree-money, and that within one week he shall complete the sale deed and that the plaintiff shall get it executed.

3. That defendant 2 shall execute a deed of relinquishment in respect of those villages which will be sold.

^d 4. That the sale deed in favour of the plaintiff will be absolute but defendant 1 and his heirs, representatives and transferees or to whomsoever he may direct shall be competent in any fallow season in Jeth after 5 years and before another 15th year, whenever he likes, to take back the property sold wholly or in serial order on payment of the stipulated price, and in completing the return of the sale deed the plaintiff and his heirs, representatives and transferees shall have no objection, and every person in whose possession the property sold will stand shall be bound by the said condition and this shall be a main condition of the absolute sale deed mentioned above.

5. That from the date of the sale deed the defendant shall deliver to the plaintiff possession of the property sold and shall cause the mutation of names to be effected.

6. That the price of the property sold has been settled in this way that after deducting revenue, Government remission and sewai items there will be net profit including income from sir and khudkashht for 1339 Fasli according to the Government record and on that net profit price will be fixed at the rate of 6 annas per cent. per month, that is, if the said

net profit will amount to Rs. 4-8-0 annually then the price of that property will be Rs. 100.

7. That whatever liabilities in respect of the property sold remain on defendant 1 according to the proposed sale-deed in favour of the plaintiff, then for discharging them the entire village Kanmau inclusive of hamlets shall as hitherto be deemed to be hypothecated and mortgaged and that from the date of the execution of the sale-deed the entire remaining mortgaged property shall be deemed to be discharged from the charge of the decree.

8. That defendant 1 shall not claim ex-proprietary rights and if he does then he shall be bound to return the price to that extent.

9. That each party is competent to get the decree registered if he likes.

(Sd.) P. Kaul,

15th July 1933.

Sub-Judge, Sitapur."

^j On 26th May 1934, the creditor applied for execution of the above decree of 4th July 1933. The application was resisted and before the execution proceedings had been determined, on 27th April 1935 there came into force the U. P. Agriculturists' Relief Act of 1934. This Act, which is described as "an Act to make provision for the relief of agriculturists from indebtedness" and has a preamble reciting the expediency of making such provision; amongst other sections has the two following provisions:

"Section 5. (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908, the Court shall, unless for reasons to be recorded it directs otherwise, at any time, on the application of the judgment-debtor and after notice to the decree-holder, direct that any decree for money or preliminary decree for sale or foreclosure passed by it or by any Court whose business has been transferred to it against an agriculturist, whether before or after this Act comes into force, shall be converted into a decree for payment by instalments drawn up in such terms as it thinks fit in accordance with the provisions of Section 3: Provided that any final decree for sale which has not been fully satisfied, passed before this Act comes into force, shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, be revisable in the same manner and to the same extent as the preliminary decree for sale or foreclosure passed against an agriculturist.

(2) If, on the application of the judgment-debtor, the Court refuses to grant instalments, or grants a number or period of instalments which the judgment-debtor considers inadequate, its order shall be appealable to the Court to which the Court passing the order is immediately subordinate, and the decision of the appellate Court shall be final.

Section 30. (1) Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. 2 for the period from 1st January 1930, till such date as may be fixed by the Local Government in the Gazette in this behalf. (2) If a decree has already been passed on the basis of a loan and remains unsatisfied in whole or in part, the Court which passed the decree shall on the application of the judgment-debtor amend it by reducing, in accordance with the provisions of sub-s. (1), the amount decreed on account of interest. (3) A decree amended in accordance with the provisions of sub-s. (2) shall be deemed to bear the date of the original decree,

a and, notwithstanding any provision in any law to the contrary, no appeal shall lie from any order amending a decree under that sub-section."

On 23rd July 1935, the debtor applied in the Court of the Subordinate Judge, Sitapur for relief under the Act and on 11th January the Judge made an order amending the decree by reducing the rates of interest, making no order as to sale, but directing that the principal money should be paid by twelve yearly instalments, on default in three instalments the whole to become due.

b On 9th February 1936, the creditor applied to the Chief Court at Lucknow for revision under S. 115, Civil P. C., alleging that the Subordinate Judge had acted without jurisdiction. The Chief Court, after amending the decree to conform to the compromise without objection of the parties, decided that the application for relief was not within the terms of the Act and set aside the order of the Subordinate Judge granting relief. Their judgment points out that S. 5 of the Act refers to four kinds of decrees only: a decree for money, a preliminary decree for sale, a preliminary decree for foreclosure, and a final decree for sale which has not been fully satisfied. Being of opinion that all such decrees had the common feature of providing for the payment of money by the judgment-debtor to the judgment-creditor, they came to the conclusion that the section was only meant to apply to such decrees as contained a direction for payment of money. In the present case they found no such provision, and so they held that the Act did not apply.

c Their Lordships do not agree with this reasoning. The words of a remedial statute must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved. But in the present case the provisions of the decree plainly indicate that it is a final decree for sale. It is made in suit No. 27 of 1933. It is headed "Civil side decree for sale under the terms of compromise." It recites the claim "to recover Rs. 3,88,300-2-6, by sale of the mortgaged property." It declares the amount due up to 4th July 1933, and

d "it is hereby ordered and decreed as follows: 1. That the said amount with interest be paid in the manner provided in the compromise which forms part of this decree."

When the compromise is looked at cl. (1) provides "that a final decree for sale as sought for for Rs. 3,88,300-2-6 may be passed in favour of the plaintiff against the defendants." It then proceeds in cl. (2) to provide that as to the satisfaction of the decree money the defen-

dant shall execute in favour of the plaintiff a sale deed in respect of villages to be selected by the plaintiff which will be sufficient to satisfy the decree money and within a week complete the sale deed. It has a provision in cl. (4) providing that the sale deed should be absolute but that after five years the defendant was to have the right to take back the property on payment of the stipulated price: and a provision that the price should be fixed at a capital sum on which the net profit of the villages shall return $4\frac{1}{2}$ per cent. per annum. The position therefore is that in a suit in which the plaintiff was entitled to a preliminary decree for sale followed by a final decree for sale the parties agreed to forego any preliminary decree. It was rightly conceded by the creditor's counsel that this did not invalidate the final decree. If the parties had not come to terms the final decree might have given the creditor the right to bid, and if his bid was accepted the price to be paid by him would be set off against the debt. There seems to be no reason at all why the parties should not dispense with these forms, and arrange that the sale should be direct by the debtor to the creditor: and as part of the transaction agree for a condition of re-purchase. The sale is still a sale by decree of the Court: and the debtor in the last resort is under the compulsion of the Court. It is difficult to see how the Chief Court finds in the ordinary decrees mentioned in the Relief Act a common feature providing for payment of money by the judgment-debtor to the decree-holder. On a public sale the money is paid into Court: if the creditor is allowed to bid the price is set off. But in any case in the present decree the "price" when ascertained is to satisfy if possible the amount of the declared debt. Further, in their Lordships' opinion there seems no reason why the debtor in the present proceedings should not have had the right given him by O. 34, R. 5 within 30 days of the sale to bring the whole sum due into Court and put an end to the sale. It has been unnecessary to deal separately with the claim for reduction of interest under S. 30, Relief Act. This seems to be so clearly the case of a decree "passed on the basis of a loan" that the right to relief appears indisputable. The learned Judges in the High Court appear to overlook the fact that the relief decreed on this matter is not confined to future interest but modifies the past interest from 1st January and 23rd February 1930, respectively.

In the course of their judgment the High Court, referring to the discretion given to the Judge under S. 5 to grant relief "unless for

a reasons to be recorded it directs otherwise," expressed an opinion that this was a case to which S. 5 should not be applied for the reason that the judgment-debtor agreed to pay off the decretal amount by executing a deed of sale, and it would not be just to allow him to resile from that agreement. This consideration appears, with respect, to be more appropriate to appeal than to revision; but as the operation of a Relief Act is one of general importance it may be as well to point out that the object of all such Acts is to give relief from agreements made by the applicants whether under the laws relating to usury b or otherwise, and that it cannot in ordinary circumstances be an objection to relief that the applicant is seeking to resile from the very agreement against which the law has expressly said he may be relieved.

For the reasons given above this appeal should be allowed and the order of the Subordinate Judge dated 11th January 1936, amending the decree of 4th July 1933, as altered by the Chief Court on revision should be restored: respondent 1 must pay the appellant's costs in the Chief Court and before this Board. It appears that since the hearing in the Chief Court the sale deed has been c executed and the creditor has been placed in possession of the property. The appellant must have liberty to apply in the Court of the Civil Judge at Sitapur to redress the situation. This will of course not prejudice the right of any competent tribunal to remove the case elsewhere. Their Lordships will humbly advise His Majesty accordingly.

G.N.

*Appeal allowed.*Solicitors for Appellant — *W. W. Box & Co.*Solicitors for Respondents — *Douglas Grant and Dold.***A. I. R. (31) 1944 Privy Council 39**

d (*From Bombay: ('42) 29 A. I. R. 1942 Bombay 208*)

21st December 1943

LORD ATKIN, LORD PORTER AND
SIR GEORGE RANKIN*Bilasrai Joharmal and another —**Appellants*

v.

Shivnarayan Sarupchand and others —
Respondents.

Privy Council Appeal No. 6 of 1943.

(a) **Trustee — Removal —** Founder trustee spending about 7 lacs on trust — His removal from trusteeship is drastic and cannot be readily justified.

Where a new hospital has been built and equipped at a cost (to the founder) of some four lacs, and in addition thereto three lacs have been invested by

him on behalf of the trust in property in Bombay, e his removal from the office of trustee is a drastic measure not readily to be justified in the interest of the charity. [P 41h]

(b) **Trust — Change of name though breach of trust does not justify removal of trustee.**

A charity does not change its nature merely by a change of name; and further the change of name is not such a serious breach of trust as to justify the removal of the trustees. [P41d]

(c) **Trust — Charitable hospital in foreign country —** No doubt Bombay High Court can act in personam if trustees are in Bombay but it is not advisable to remove trustees—Plaintiffs should be left to their remedies in Courts of foreign country where hospital is situated and people from which are beneficiaries.

As a Court of Equity acts in personam it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connexion with rights to property situated abroad. But the Court will not take upon itself to interfere with the administration of a charity when that charity has to be conducted in a foreign country and the Court is for that reason in no position to supervise its administration effectively. The Court will no doubt protect and preserve the funds of the charity by the exercise of its jurisdiction over the trustees or other persons. But the proper conduct of the charity and the giving of any necessary directions for that purpose are another matter. Where the Court is asked to make an order which affected the administration of the charity at every point—namely, an order for the removal of the persons who were conducting the management of the hospital and for the transfer to other persons of the land and buildings (of the hospital) as well as of the immovables in Bombay in which the money of the charity was invested, the Bombay High Court should leave the plaintiffs to their remedy from the Courts of the country in which the hospital is carried on and whose poor are the beneficiaries of the charity. It would be inconvenient if not intolerable that the Courts of a foreign country should interpose their authority upon particular questions arising in the course of administering such a trust acting intermittently according as they may be invoked by particular complainants in preference to the Courts of the country in which the charity was meant to operate, and enforcing their orders by removing the trustees and entrusting to others the management of all the charity and its affairs. [P 41g,h ; P 42b,c,d]

Sir Herbert Cunliffe and S. P. Khambatta — h
for Appellants.

Sir Thomas Strangman and R. T. Gibson —
for Respondents.

Sir George Rankin. — The appellants on 2nd September 1939, with the sanction of the Advocate-General, brought a suit on the Original Side of the High Court at Bombay under S. 92 of the Code in respect of a public charity. The charity concerned is a hospital at a town in the Jaipur State called Bagar. It was established in 1926 for providing medical relief to the poor and was called Shivnarayan Joharmal Bagar Hospital. The plaint asked that the defendants, who were five in number, should be removed from their office as trustees and that new trustees be appointed by the

^a Court. It also asked for accounts to be taken of the defendants' management, on the footing that they had been guilty of misapplying the funds of the trust; but it is now plain that this allegation is wholly without substance and that the sole ground of complaint is that the defendants have without authority changed the name of the hospital to Shivnarayan Chiranjilal Rungta Hospital and are employing this new style both in bills, papers and labels of the hospital and on the rent notes issued in respect of the property in which the funds are invested.

The learned trial Judge, Chagla J., by his ^b decree of 10th October 1941, removed the trustees and appointed new trustees. He directed the defendants to hand over to the new trustees the trust properties in their possession, together with all the books of account, papers, vouchers, documents, etc., relating to the hospital, but the decree contains no provision giving relief against misapplication of trust monies and no direction for accounts. On appeal Beaumont C. J. and Somjee J. set aside this decree and dismissed the suit; and from their decree dated 19th March 1942, this appeal is brought.

^c Defendant 1 is Shivnarayan, and Joharmal is the name of his brother. Rungta is their family name. Bilasrai, plaintiff 1, is one of the two sons of Joharmal—the other, Govindram, having been given in adoption to Shivnarayan, whose only son Chiranjilal died in 1922. Shivnarayan and his brother are natives of Jaipur and come from Bagar. Both plaintiffs are described in the cause title as “of Bagar.” The history and nature of the charity is sufficiently disclosed by two deeds. The first is dated 21st April 1936, and recites that in or about 1926 Shivnarayan had set apart the sum of one lac for the purpose of establishing and maintaining a hospital at Bagar and that ^d the sum standing to the credit of the fund with the family firm had increased to Rupees 1,42,079. It provides that Shivnarayan (defendant 1), Bilasrai Joharmal (plaintiff 1), Bholaram Hardatrai and Onkarmal Pannalal (defendants 3 and 4), together with one Brijlal Ramjidas, should be trustees. They were to apply the trust monies in establishing and maintaining “a hospital or hospitals in Bagar or elsewhere for providing free medical aid to the poor people.” Clause 3 was as follows:

“3. The said trust moneys, securities, investments and the properties forming part of the trusts shall be called Shivnarayan Juharmal Bagar Hospital Trust Fund and the hospital or hospitals established by the trustees out of the trust funds shall be called Shivnarayan Juharmal Bagar Hospital or Hospitals. The said trust moneys, securities, investments, etc.,

shall be kept in the said Shivnarayan Juharmal Bagar Hospital account.”

The second deed is dated 12th May 1939. It recites that Brijlal Ramjidas and the plaintiff Bilasrai Joharmal had resigned from the trusteeship, that pursuant to a decree of the High Court at Bombay dated 15th October 1937, certain immovable property in Bombay known as Chowpatty Chambers had in 1938 been acquired for the trust as an investment of its funds, and that in addition to this property the trust was possessed of Rs. 81,800 in deposit with a Calcutta firm. By the operative clauses of this deed Shivnarayan Bholaram and Onkarmal appoint as new trustees Hari-ram Banarsidas and Motilal Nath (defendants 2 and 3 in the present suit). This deed ends by providing :

“And whereas the whole of the moneys subject to the trusts of the said deed poll deed of trust were contributed by the said Shivnarayan Sarupchand alone and the said Shivnarayan Sarupchand has requested the continuing and the new trustees that the charities created thereunder should henceforth be known by the name of ‘The Shivnarayan Chiranjilal Rungta Hospital Charities’ the continuing and the new trustees hereby declare that the name of the charities created by and subject to the trust of the said deed poll deed of trust shall henceforth be and be carried on in the said name of ‘Shivnarayan Chiranjilal Rungta Hospital Charities’.”

^g From the plaint (para. 4) it would appear that for some time the family name “Rungta” had been used instead of the word “Bagar” in the title. However that may be, the effect of the change proposed by the deed of 1939 was to remove the name of “Joharmal” from the title of the charity and to put in its place the name of “Chiranjilal,” the deceased son of Shivnarayan. That this should give offence to Joharmal and his son Bilasrai was perhaps only to be expected. Shivnarayan by his written statement makes the case that when he first provided the sum of one lac to found the charity he included his brother Joharmal’s ^h name in its title because Joharmal promised to contribute to its funds equally with himself. Of this allegation, however, there is no proof; but it is clear that while Joharmal is a co-owner of the site on which a hospital in Bagar has been built, Shivnarayan is the founder of the charity and has out of his own funds endowed it with large sums. A new hospital has been built and equipped at Bagar at a cost to Shivnarayan of some four lacs, and in addition thereto three lacs have been invested by him on behalf of the trust in property in Bombay. His removal from the office of trustee is therefore a drastic measure not readily to be justified in the interests of the charity or of the poor of Bagar.

The learned trial Judge refused to apply the principle that he ought not to interfere in the administration of a charity which is carried on within the borders of an independent State. He appears to have accepted as well settled the rule that if the Court is not in a position to supervise the carrying out of a charity it will not frame a scheme in respect of that charity but will take such steps only as are necessary to safeguard such trust funds as lie within the jurisdiction: 18 Bom. 551;¹ 18 Bom. L.R. 60.² But he took the view — somewhat unreasonably, as their Lordships think — that if the name was changed without proper authority the application of the hospital funds to the hospital was a misapplication of those funds and amounted to a breach of trust which required the Court to safeguard them. Further, he took strong exception to the defendants' conduct, in that on 13th February 1941 — that is, pending suit — they had presented a petition to the Jaipur "Court of Nizamat Shekhawati" asking that the change of name might be ratified and confirmed. While acquitting them of dishonesty or moral turpitude, he suggested to their counsel that if they were prepared to resign he "might consider the question of condoning their breach of trust," and as this was not acceded to he removed them from office. In their Lordships' view this method of dealing with the matter is open to serious criticism even on the assumption that the defendants' conduct amounted to a breach of trust which the Court was called upon to correct. If the learned Judge had ordered the defendants to restore the original name they might or might not have obtained a stay of his order and appealed from it. If they failed to comply with it, a motion to remove them or to commit them could have been made in due course and upon proper materials. But to require them to resign, and on their refusal to direct their removal from office was to take action far in excess of anything that was called for. The defendants' refusal to resign added nothing whatever to the case against them.

Their Lordships agree with the Appellate Bench in holding that the petition to the Jaipur tribunal was not an act in defiance of the High Court of Bombay; that a charity does not change its nature merely by a change of name; and that on any view the change of name was not such a serious breach of trust as to justify the removal of the trustees. The learned Chief Justice further observed :

1. ('94) 18 Bom. 551, *Advocate-General v. Bai Punjabai*.
2. ('16) 3 A.I.R. 1916 Bom. 225 : 32 I. C. 925 : 18 Bom. L.R. 60, *Kanji v. Advocate-General*.

"Now, this charity, as appears from the plaint, is a foreign charity. It conducts a hospital in Jaipur State, and it is a well established principle that the administration of a charity depends upon the law, and is controlled by the Court, of the country where the charity is conducted. In my opinion, there is no jurisdiction in this Court to remove trustees of a charity functioning in Jaipur State, and to appoint new trustees of that charity."

The correctness of this view of the law has been challenged in argument by Sir Herbert Cunliffe on behalf of the appellants, who has insisted on the facts that the trust was originally created in Bombay with monies then lying in Bombay; that these were invested in Bombay property pursuant to an order of the High Court of Bombay; and that the breaches of trust complained of had been to some extent committed in Bombay in connexion with the rent notes and other papers. He pointed also to the words "hospital or hospitals in Bagar or elsewhere" which appear in cl. (1) of the deed of 21st April 1936.

It does not appear that any objection was taken at the trial to the jurisdiction under cl. 12, High Court's Letters Patent, and their Lordships are satisfied that there was no defect of jurisdiction in that sense. As a Court of Equity acts in personam it may and sometimes does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connexion with rights to property situated abroad. The question here, however, is as to the principles which the Court will observe in taking upon itself to interfere with the administration of a charity when that charity has to be conducted in a foreign country and the Court is for that reason in no position to supervise its administration effectively. That the Court will protect and preserve the funds of the charity by the exercise of its jurisdiction over the trustees or other persons is very certain. But the proper conduct of the charity and the giving of any necessary directions for that purpose are another matter. In this case the Court was asked to make an order which affected the administration of the charity at every point — namely, an order for the removal of the persons who were conducting the management of the hospital and for the transfer to other persons of the land and buildings at Bagar as well as of the immovables in Bombay in which the money of the charity was invested. The words "or elsewhere" in the deed of 1936 do not seem to be important for the present purpose, seeing that the only hospital belonging to the trust was at Bagar and that no other charity was being conducted by the trustees. Once it is admitted that part of the cause of

a action arose within the jurisdiction so as to satisfy the requirements of cl. 12, Letters Patent, no great importance attaches to the place where the trust was created or its money invested, if there is no question of preserving or recovering its property and if the only question is as to the country whose Courts should supervise the conduct of the charity and the application of its funds. The jurisdiction of the Court to remove trustees, as Lord Blackburn said in (1884) 9 A. C. 371³ at pp. 386 to 387, "is merely ancillary to its principal duty, to see that the trusts are properly executed." And he added that

b "in exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle that their main guide must be the welfare of the beneficiaries."

The learned Chief Justice has pointed out that no evidence was given upon the question whether the law of the Jaipur State permitted trustees to alter the name of a charity such as this without the order of a Court; and that if any Court can sanction such a change or condone the action of the trustees in making it, the proper Court for the purpose must be that of the Jaipur State. The case is not one of founding a charity abroad, or settling a scheme for a charity to be conducted abroad, nor of preserving the property of a foreign charity, nor of assisting a foreign charity or a foreign Court to collect or administer funds within the jurisdiction. Their Lordships cannot doubt that upon settled principles it was a correct exercise of discretion by the High Court of Bombay that it should leave the plaintiffs to their remedy from the Courts of the country in which this hospital is carried on and whose poor are the beneficiaries of the charity. It would be plainly inconvenient if not intolerable that the Courts of a foreign country should interpose their authority upon particular questions arising in the course of administering such a trust — acting intermittently according as they may be invoked by particular complainants in preference to the Courts of the country in which the charity was meant to operate, and enforcing their orders by removing the trustees and entrusting to others the management of all the charity and its affairs. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of respondents 1, 3, 4 and 5.

R.K. *Appeal dismissed.*
Solicitors for Appellants — *T. L. Wilson & Co.*
Solicitors for Respondents — *Lattey & Dawe.*

A. I. R. (31) 1944 Privy Council 42
(*From Calcutta: ('41)28 A.I.R.1941Cal.60*)

21st December 1943

LORDS ROMER, PORTER AND CLAUSON,
SIR GEORGE RANKIN AND SIR
MADHAVAN NAIR

Corporation of Calcutta — Appellants

v.

Province of Bengal — Respondents.

Privy Council Appeal No. 23 of 1942 ; Bengal Appeal No. 12 of 1940.

Calcutta Municipal Act (3 of 1923), S. 127—
Government servant occupying house under
internal regulations for guidance of Financial
Department — House is occupied as tenant —
Test as to whether he occupies as tenant or not
laid down.

The mere fact that it is convenient to both parties (i. e., master and servant) that the servant should occupy a particular house and that he is put in possession of it for that reason does not prevent him from being a tenant : his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necessary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required : (1875) 10 C. P. 285, *Ref.* [P 45c,d]

The position is unaffected by the circumstance that the servant is entitled to occupy the house only so long as he retains his position as servant or the particular office in virtue of which the house is provided. The same principles apply though he may be a tenant at will : (1875) 10 Q. B. 422 and (1890) 24 Q. B. D. 147, *Ref.* [P 45d]

Where a house is put at the disposal of a Government servant, occupied by him under the terms of the internal regulations for the guidance of the Financial Department of the Government of Bengal the building is ordinarily let within the meaning of the Act and is rightly rated under S. 127 (a), Calcutta Municipal Act. [P 46e,f]

Sir Herbert Cunliffe and J. M. Pringle —
for Appellants.

J. M. Tucker and R. K. Handoo —
for Respondents.

Lord Porter. — This appeal is against the judgment and decree of the High Court of Judicature at Fort William in Bengal, dated 13th August 1940, dismissing an appeal from the judgment and decree of the Chief Judge of the Court of Small Causes at Calcutta. The question at issue is whether for the purpose of the assessment to the consolidated rate of a house in Calcutta owned by the respondent and occupied by the Commissioner of the Presidency Division in Bengal the annual value falls to be calculated under sub-s. (a) or under sub-s. (b) of S. 127, Calcutta Municipal Act (Bengal Act 3 of 1923.) This section reads as follows :

"For the purposes of assessing land and buildings to the consolidated rate—(a) the annual value of land, and the annual value of any building erected

a for letting purposes or ordinarily let, shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less in the case of a building, an allowance of 10 per cent. for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent; and (b) the annual value of any building not erected for letting purposes and not ordinarily let shall be deemed to be 5 per cent. on the sum obtained by adding the estimated present cost of erecting the building, less a reasonable amount to be deducted on account of depreciation (if any) to the estimated present value of the land valued with the building as part of the same premises."

b The house in question is No. 4, Theatre Road, Calcutta, which since its purchase by the respondent in 1906 has with a few trivial exceptions been occupied by the Commissioner as his official residence. The purpose for which it was erected is unknown and the answer to the question which their Lordships have to determine therefore depends on whether it can be said to be ordinarily let or not. No question as to the amount chargeable arises. Whichever way their Lordships decide, the figures are not disputed. On one matter the disputants are not in conflict, it is agreed that ordinarily let means usually let and it is not contended that the house must be shown to be let on ordinary terms.

c The house was purchased on behalf of the respondents at the end of 1906 or early 1907. Before buying it they wrote to the Government of India proposing to acquire a house which could be occupied by the Commissioner. From their letter it appears that the lack of suitable accommodation at reasonable cost together with the possibility of being compelled to vacate at a moment's notice any premises taken and of failing to re-let them had resulted in the Commissioner either residing at his club or in an unsuitable position. The Government of Bengal were therefore anxious that a house should be available. In d their view a good house in Calcutta itself in an accessible and convenient situation which should be known to the public at large was of the first importance. At that time they contemplated making residence compulsory. For about a year and a half after it was acquired the house was occupied by the tenant then in possession. Thereafter it has been with the exception of two immaterial periods occupied by the Commissioner for the time being. It is of the old residential type standing in a large garden, its value to rent is about Rs. 900, and it bears a nameplate with the inscription "Commissioner, Presidency Division."

Up till 1937 the assessment of the house had been treated as falling under S. 127 (b) of the Act, but on 13th May in that year the res-

pondent filed a suit in the Court of Small Causes, Calcutta, the appropriate Court for this purpose, claiming that the house was erected for letting, was let until 1908, and continued to be let thereafter, that a fair rent would be Rs. 700 per month and that the correct annual value would be Rs. 7560.

After hearing the evidence the Chief Judge held (1) that the house had been let to each successive Commissioner since its acquisition, he being responsible for a sum as rent and the occupier's share of the taxes, both of which he was liable to pay so long as he held the post of Commissioner, (2) that during that period he had the right to occupy the property in consideration of his paying or submitting to a deduction from his salary of 10 per cent., (3) that the relationship of landlord and tenant existed between the Government and the Commissioner and that the correct basis of assessment was under S. 127 (a), the correct figure for the annual value being Rs. 9720. On appeal to the High Court, the case was remitted to the Chief Judge to determine: (a) whether the Commissioner was required to occupy the house for the performance of his services; (b) did he occupy it in order to their performance? or (c) was it conducive to that purpose more than any other house which he might have himself rented? g

In pursuance of these directions the learned Chief Judge took further evidence and after doing so held that the fact that it was made obligatory for the Commissioner to reside in the house, together with the facts that every Commissioner had continually done so since its acquirement, that it was known as the Commissioner's house, that it was situated in a convenient locality and was in fact used by the Commissioner for the performance of some of his official duties, all led to the irresistible conclusion that the Commissioner h (a) was required to occupy the house for the performance of his duties; (b) did occupy it in order to their performance; and (c) that it was conducive to that purpose more than any other house which he might himself have rented. The Chief Judge added that as a result of the additional evidence it appeared that the Commissioner occupied the house as a servant and not as a tenant.

When the record was returned to the High Court the learned Judges of that body differed from the Chief Judge. In their view the Commissioner held the house on the terms of the general rules applicable to all Government servants, and those rules did not compel him to occupy the house, but did make

a him responsible for rent, leaving him free to sub-let by permission of the Government. They further held that having regard to these findings and the fact that the Commissioner had given evidence that he could perform his duties equally well though residing in another house, a finding in the affirmative under heads (2) and (3) was not justified. Accordingly they held that the Commissioner's occupation was that of a tenant and the house was assessable under S. 127 (a).

The exact regulations which deal with the terms upon which houses occupied by Government officials are provided are not easy b to ascertain. In answer to a letter from the Deputy Executive Officer of the Calcutta Corporation, Mr. G. S. Dutt, the Secretary of the Government of Bengal Department of Public Health and Local Self-Government, after stating in an earlier letter that the occupation of the house by the Commissioner was compulsory, corrected himself on 15th December 1939, and said that the occupation was subject to certain rules, of which he enclosed a copy. These rules are printed in the record furnished to their Lordships and are the only material so provided. Strictly speaking, they appear to contain internal regulations for the guidance of the financial department of the Government of Bengal, and they are not so framed as to, nor in any case could they of themselves, contain a contract between the Government and one of its servants: see 1895 A. C. 229.¹

Nor indeed do they authorize the Government or anyone on its behalf to make such a contract. The power to make rules for regulating the conditions of service pay and allowances of the Civil Service in India is to be found in the Government of India Act, 1915, S. 96B. Under that authority certain d fundamental rules were made, that applicable to the present case being No. 45, which provides that

"A Local Government may make rules laying down the principles governing the allotment to officers serving under its administrative control for use by them as residences of such buildings owned or leased by it . . . as the Local Government may make available for the purpose. Such rules . . . may prescribe the circumstances in which such an officer shall be considered to be in occupation of a residence."

Rule 45 (a), after dealing with the method of calculating the capital cost to the Government of buildings which it acquires and of ascertaining the standard rent of such as are leased, goes on to provide in sub-r. 4 (b) that

1. (1895) 1895 A. C. 229: 64 L. J. P. C. 119: 11 R. 375: 72 L. T. 130: 43 W. R. 637, *Shenton v. Smith*.

"unless in any case it be otherwise expressly e provided in these rules," the officer

"shall pay (i) rent for the residence, such rent being the standard rent or 10 per cent. of his monthly emoluments whichever be less, and (ii) municipal and other taxes payable by Government in respect of the residence not being in the nature of house or property tax."

The rule further sets out various modifications of the provisions as to rent in particular cases and in sub-r. (6) deals with the payment of additional rent in return for special services undertaken by the Government and requires the tenant to pay certain additional charges.

Under the provisions of fundamental R. 45, f the Government of Bengal did make certain subsidiary regulations dealing with the provision of residences to their servants, but as these regulations do not substantially differ from the financial rules set out in the record their Lordships treat the latter, as the parties were content to treat them, as being applicable to the present case.

Those rules provide:

279. Residence for public servants may be . . . purchased by Government. . . .

(iv) when it is shown to the satisfaction of the Local Government that suitable house accommodation for officers whose appointments are permanent in respect of locality is not available in the vicinity or is available only under circumstances which will be likely to place such officers in an undesirable position in relation to house proprietors." g

Rent Rules for Government Buildings used as Residences.

281. The incumbent, whether permanent or temporary, of an appointment for whose benefit a house has been constructed or purchased or leased by Government will be held responsible for the prescribed rent during his tenure of the appointment."

Certain instances are given in which the Local Government may make exception to this rule, e. g., when the house is not occupied because the holder of another post is doing the duty or when the holder has been transferred from a post in the same station and it h is not considered necessary that he should change his residence or when an Indian officer is appointed and the residence has been constructed to suit a European or vice versa or where a temporary holder for not more than two months is prevented from occupying the house by circumstances which the Local Government consider sufficient to warrant as exception.

Rule 282 permits the sub-letting of such residences provided:

"(i) the sub-let should be to a tenant approved by the Superintending Engineer;

(ii) the officer will still remain personally responsible for the rent and for any damage caused to the building by fair wear and tear;

(iii) Government will not recognise the sub-tenancy.

(iv) The rent to be charged by the officer to his tenant should not, except with the sanction of the Local Government in special circumstances exceed the rent paid by the officer to Government.

(v) Sub-tenancy should continue only for so long as the officer who makes the arrangement holds the appointment for which the official residence is provided."

The only further evidence to which their Lordships need refer is that of the Commissioner at the material time who stated that he was in exclusive occupation, that he could live in any other residential quarter in order to perform his duties and could perform them equally well there, that official residences of Commissioners are generally known as Commissioners' houses and that a knowledge of their position and their accessibility is important and that he has to pay 10 per cent. of his salary whether he occupies the house or not.

In the Courts in India the question at issue was apparently treated as if it had arisen between subject and subject and no question was raised as to the possibility of establishing a contract between a Government and its servants or as to the authority under which such a contract was or could be made.

Very scanty evidence has been furnished in the case and none as to the making of any contract. If there be any it must be spelt out of the facts established and mainly from the evidence of the Commissioner and the rules printed in the record.

Apart from the complication arising from the fact that the house is occupied by a Government servant, their Lordships find themselves in substantial agreement with the High Court in India. The general principles upon which a tenancy as opposed to an occupation as servant is created are not in dispute. The mere fact that it is convenient to both parties that the servant should occupy a particular house and that he is put in possession of it for that reason does not prevent the servant from being a tenant: his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necessary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required. *See per Brett J. in (1875) 10 C. P. 285² at page 295.*

The position is unaffected by the circumstance that the servant is entitled to occupy the house only so long as he retains his position as servant or the particular office in virtue of which the house is provided. The

same principles apply though he may be a tenant at will. *See (1875) 10 Q. B. 422³ and (1890) 24 Q. B. D. 147.⁴*

In the present case their Lordships are of opinion that the Commissioner is neither compelled to live in the house nor is it necessary for him to do so in order to perform his duty. As to the latter point their Lordships have the Commissioner's evidence and nothing to contradict it. As to the former it may be that when the house was purchased it was contemplated that those holding the office of Commissioner would be compelled to live there but if so the intention was not carried out.

He who holds the office is indeed required to pay rent, but provided he does so there is nothing to compel him to reside in the house. He may even sub-let it with the permission of the Government though this does not involve a recognition of the sub-tenancy and the sub-tenancy is to continue only for so long as the sub-lessor holds the appointment.

Having regard to the facts that it is contemplated that the Commissioner should occupy the whole house, that he is under an obligation to pay what is called rent whether he occupies it or not, and that he pays the occupier's share of taxes, their Lordships would unhesitatingly come to the conclusion that the Commissioner occupied the house as a tenant in a case where anyone other than Government was the owner. The difficulty in the case lies in that fact and in the fact that the Commissioner is a Government servant.

It was admitted on behalf of the respondent that except in special circumstances no contract would exist or could be implied between a Government and its servant in respect of that service and that there was nothing in the present case which would prevent the ordinary rule from applying. But it was said though no contract could be implied in respect of the service, yet a contract could be expressly made or could be implied between those parties in respect of matters other than the service. Having regard to this argument it has in the first place to be determined whether the occupation of the house formed part of or was incidental to the contract of service or whether it formed a separate transaction between the Crown and the Commissioner. As to this question their Lordships entertain no doubt that the occupation is not incidental to nor is it dependent upon the contract of service. It is true that in the ordinary course

3. (1875) 10 Q.B. 422: 44 L. J. M. C. 114: 32 L.T. 859: 23 W. R. 745, *Smith v. Seghill Overseers*.

4. (1890) 24 Q.B.D. 147: 59 L.J.Q.B. 100: 38 W.R. 495: 54 J. P. 294: *Fox 157, Marsh v. Estcourt*.

2. (1875) 10 C. P. 285: 44 L. J. C. P. 42: 31 L. T. 478: 23 W. R. 244, *Fox v. Dally*.

a the house would not be put at the disposal of the Commissioner unless he held that office. It is given him for that reason, but its provision forms no part of the terms of service, and it is open to him to refuse to live there if he does not desire to do so.

Certain limitations upon the Commissioner's rights (if he have any) must be conceded, viz.: (i) Even if in the particular case there were a contract the servant would still be subject to summary dismissal at the pleasure of the Crown. (1897) 66 L.J.Q.B. 422.⁵ (ii) The Commissioner might be transferred at any time to another post and is entitled (if b at all) to occupy the residence only whilst he holds the office. (iii) The Crown could at any moment terminate his occupation of the house even though he remained in his post of Commissioner.

In these circumstances, were it not for the considerations hereinafter mentioned, it would have to be determined whether he had any estate in the house or whether he was a mere licensee in occupation as a servant of the Government. If he had any right it could be no more than a tenancy at will since the Crown could terminate his occupation at any time and the tenancy (if any) must be implied since no express contract exists. That c such an implication is possible appears from (1845) 14 M. & W. 682,⁶ where Parke B. said "*Richardson v. Langridge*⁷ correctly lays down the law on this subject, viz., that a simple permission to occupy creates a tenancy at will."

It was suggested that in the present case the implication suggested would be impossible inasmuch as a tenancy at will must be terminable at the will of either party. The Crown, it was contended, could terminate the occupation at any time, but the Commissioner could not. Their Lordships cannot accede to this argument. In their view the Commissioner could cease to occupy the house at any moment and thereupon would terminate any tenancy though he would still remain liable for the payment of the monthly sum designated as rent.

If then the existence of a tenancy at will can be implied should such an implication be made in the case of a house situated in Calcutta owned by the Government of the Province of Bengal and occupied as the Commissioner's house is occupied in the present instance? In their Lordships' view it is not necessary finally to determine this question.

5. (1897) 66 L.J.Q.B. 422, *De Dohse v. R.*

6. (1845) 14 M. & W. 682 : 15 L.J. Ex. 41 : 9 Jur. 1060 : 69 R.R. 781, *Doe d. Hull v. Wood.*

7. (1811) 4 Taunt 128 : 13 R. R. 570.

The rules, it is true, do not make a contract between the Crown and the Commissioner but they do indicate the position if a house is in fact placed at his disposal. The Crown is under no obligation to provide a house nor the servant to live in it, but if a house is provided the Commissioner is in exclusive possession and is responsible for the rent whether he lives in it or not; he may sub-let and he pays the occupier's share of the rates.

Whatever the effect of such a circumstance in other cases (as to which they express no opinion) their Lordships are of opinion that where a house is put at the disposal of a Government servant, occupied by him under the terms of the regulations applicable to the present case and retained and enjoyed as this house has been, the building is ordinarily let within the meaning of the Act and is therefore rightly rated under S. 127 (a), Calcutta Municipal Act (Bengal Act 3 of 1923).

They will humbly advise His Majesty to dismiss the appeal. The appellants must pay the costs of the proceedings before the Board.

R.K.

Appeal dismissed.

Solicitors for Appellants — *W. W. Box & Co.*

Solicitors for Respondents—*Solicitor India office.*

A. I. R. (31) 1944 Privy Council 46

(From Nagpur)

21st December 1943

LORD ATKIN, LORD PORTER AND
SIR GEORGE RANKIN

Seth Manakchand — Appellant

v.

Chaube Manoharlal and another —

Respondents.

Privy Council Appeal No. 4 of 1942.

Civil P. C. (1908), S. 47 and O. 34, R. 1—Suit for foreclosure — Party discharged as claiming paramount title — Decree cannot be executed against him — Decree is to be construed with reference to judgment and not with reference to pleadings and mortgage but without reference to judgment.

The malguzar of a village had mortgaged the village in 1895. In due course of time a four annas share in the equity of redemption of that mortgage was acquired by R, G's son. A four annas share in the mortgagee rights passed to G and a four annas in G's brother. G and R executed a mortgage in 1919 in favour of M of the malguzari rights in a four annas share. The mortgagee M brought a suit for foreclosure including A as an attaching creditor of G's rights as mortgagee who during the pendency of the suit acquired G's rights as mortgagee of the mortgage of 1895. A having pleaded that G's mortgagee rights under 1895 were not mortgaged to M he refused to redeem M's mortgage. A was thereupon discharged as a person claiming paramount title, at M's instance. In the judgment it was held that G's interest was

a not covered by the mortgage and the mortgaged property was described in the preliminary decree as four annas of the village. *M* in execution of the foreclosure decree obtained symbolical possession only and not actual possession from *A* and prayed for a fresh warrant of possession against *A*, which was issued. The High Court construed the decree by reference to pleadings and the mortgage deed but not the judgment:

Held that the issue of a warrant of possession against *A* was without justification and the Courts had committed a serious irregularity in putting *A* to trial of his title on an application for the execution of the foreclosure decree. [P 49d,e]

b *Held further* that a party who is dismissed from a suit on the ground that he has no concern with it is no longer a party to the suit and is not bound by the decree. *A* having been discharged his claim being outside the 'controversy of the suit,' the Court acted on the principle that his claim to a paramount title—be it right or wrong—would be in no way prejudiced by any foreclosure decree that might be passed. If he was right in his contention as to the interests comprised in the mortgage of 1919 the doctrine of *lis pendens* did not apply. The decree should not therefore be executed against him as a person who was bound by it; and if he was claiming in good faith to have a right of possession not affected by the mortgage of 1919 he could not be ejected on any other footing save by an independent suit. For the purpose of interpreting the decree no other document was so directly in point as the judgment.

[P 49e,f,g; P 50b,c]

C. P. C. —

(44) Chitale, S. 38, N. 9; S. 47, N. 76.

(41) Mulla, Page 165 Pt. (r).

J. M. Parikh and S. P. Khambatta —

for Appellant.

Sir Thomas Strangman and R. K. Handoo —

for Respondents.

Sir George Rankin. — The matter for decision on this appeal is whether the respondents are entitled to recover possession from the appellant of a four annas share in a village called Chipabad. The question arises upon an application for the execution of a final decree for foreclosure dated 10th July 1930. The application was made by a tabular statement dated 19th July 1933, by which the a respondents who were the plaintiffs in the foreclosure suit asked that a warrant for possession of the four annas share be issued against the appellant. On 6th April 1934, the trial Court (the Additional District Judge of Hoshangabad) ordered that a warrant for possession should issue to eject the appellant, and an appeal from this order was dismissed by the High Court at Nagpur on 24th September 1937, against whose order this appeal is brought.

The respondents' mortgage is dated 31st May 1919. It was for Rs. 8000 and interest. The mortgagors were one Govindram and his son Rajaram. The dispute between the present parties arises upon the construction of that part of the deed which describes the pro-

perty and interest in mouza Chipabad which e the deed transfers by way of security. According to the appellant's construction of the vernacular words, what Govindram and Rajaram mortgaged, subject to a certain exception as to sir lands, was "our *malguzari* rights" in a four annas share of Chipabad and another village, called Basantpura. According to the respondents' view what the deed transferred to them as their security was "our rights in the following *malguzari* mouzas," with the exception as to sir lands. No question now arises as to the other village and Chipabad may be regarded as the only village with which this case is concerned. To explain the difference between "our rights" and "our *malguzari* rights" it is necessary to make some reference to the title of Govindram and of Rajaram.

In 1895 the *malguzar* of Chipabad was one Radhakishan, and by a deed of 13th June 1895, he had mortgaged Chipabad and Basantpura, together with the sir rights to three persons for Rs. 30,000 and interest. Of these three mortgagees, two (Sobhachand and Chogmal) had a half share in the security and one (Ramrao) had the other half. In 1898 these mortgagees had obtained possession. At the time of the respondents' mortgage of 31st q May 1919, Rajaram had acquired a four annas interest in Radhakishan's equity of redemption—the other 12 annas having come to be vested in one Partabchand, the appellant's brother. The half interest of Ramrao in the security had passed as to one moiety thereof to Govindram, who thus held a quarter (four annas) interest as mortgagee under the mortgage of 1895: while the other quarter which had belonged to Ramrao had passed to Govindram's brother Ganpat. On these facts the present respondents maintained that by the phrase "our rights in the *malguzari* mouza" Govindram and Rajaram had mortgaged the h former's interest (four annas) in the security of 1895 as well as Rajaram's interest (four annas) in the equity of redemption. The appellant on the other hand contends that by the phrase "our *malguzari* rights in a four annas share" there was transferred to the respondents only Rajaram's interest in the equity.

Their Lordships turn now to state how the appellant Manakchand comes to be concerned in this controversy as to the meaning of the mortgage deed of 1919. By 1926 when the respondents sued to enforce that mortgage, the appellant had acquired both Ganpat's one-quarter interest in the security of 1895 and the half interest therein which had originally belonged to Sobhachand and Chogmal.

The respondents' plaint was filed on 5th January 1926. It asked for payment of some Rs. 14,000 with future interest and in default of payment it claimed (inter alia) foreclosure and possession of four annas share of mouza Chipabad. Govindram and Rajaram, the mortgagors, were defendants 1 and 2. The appellant was defendant 11, and his brother Partabchand was defendant 10, both being impleaded "because they are attaching creditors of the property mortgaged after the date of the plaintiffs' mortgage" (para. 5 of plaint). The property subject to the mortgage was described (apart from a reference to the other village of Basantpura) as "four annas share of mouza Chipabad." The appellant at that date was in fact an attaching creditor of Govindram's one-quarter interest as a mortgagee under the deed of 1895, but not of any interest of Rajaram in the equity. The appellant and his brother Partabchand had obtained a money decree against Govindram on 4th August 1919. Under this decree two annas out of the four annas share of Govindram was sold on 3rd November 1926, to one Gajraj-singh and the other two annas were sold to Gajrajsingh and Shriwallab on 28th September 1926, under a decree obtained against Govindram and his son by another creditor called Haribhau in a suit of 1921. By transfers dated 6th May 1927, these shares (four annas in all) were bought by the appellant, who was thus invested with such right, title and interest as Govindram had at the date of the sales in 1926. If Govindram's one-quarter interest in the security of 1895 was not comprised in the respondents' mortgage of 1919 they had no right to foreclose the appellant and he had no right of redemption. In their written statement filed in April 1926, the appellant and his brother Partabchand pleaded that Govindram "in whose name the mortgagee rights are recorded has not mortgaged his mortgagee right by the deed in suit. It is only the proprietary rights of the village shares in suit that are purported to be mortgaged by the deed in suit" (para. 3). The respondents maintained "that the deed in suit covers both these rights." After many delays the case came before Mr. K. B. Sheorey A. D. J. on 24th September 1928, when all the facts and dates of the appellant's title were laid fully before him as appears by the appellant's additional written statement of that date. The appellant's pleader stating that he did not wish to redeem the plaintiff's mortgage, the respondents' pleader said that they thought he had a right to redeem but if he did not wish to exercise it, he might be discharged. The

Judge's order was: "As he claims a paramount title he is discharged without his costs." At the next hearing, 20th November 1928, the respondents apparently regretting the attitude which had been adopted on their behalf made an application to retain the appellant on record though he had claimed paramount title, but the learned Judge refused it saying that he saw no reason to vary his order of discharge dated 24th September 1928.

No appeal was brought from this order and the case proceeded without the appellant. It was ultimately heard and decided on 24th August 1929, by another Judge, Mr. S. Ghosh A. D. J. The appellant's brother Partabchand contended that the respondent's mortgage deed was void because the mortgaged properties were not properly described in it. This argument, which seems to have been somewhat confused, was rejected by the learned Judge who arrived at the view that the mortgaged properties were properly described by holding on the construction of the deed of 1919 that the rights of Govindram as mortgagee under the deed of 1895 were not comprised in the respondents' security. His judgment on this point is quite elaborate and plain. His formal preliminary decree by the schedule thereto described the mortgaged property as "four annas share of mouza Chipabad." The final decree for foreclosure on 20th June 1930, followed the terms of the preliminary decree as was only right.

So far therefore the appellant's claim of title to an interest in Chipabad had been held by one learned Judge to be a matter which was not to be dealt with in the suit and by another learned Judge to be untouched by the mortgage security. This latter finding had been given by the trial Judge in the appellant's absence, and in connexion with an argument that the said mortgage was void. But in passing a decree for foreclosure a Court may be supposed to concern itself to know and specify the property which is to be affected by its decree and the learned Judge had been at pains to make plain that no interest of Govindram in the security (mortgagee rights) of 1895 was being foreclosed by him or was being decreed to the respondents. From that decree no appeal was taken whether on the ground that the appellant ought to have been retained on the record as a party or on the ground that the trial Court had wrongly construed the deed or mistaken the extent of the interests which it comprised.

On 23rd July 1930, the respondents obtained possession under O. 21, R. 35—symbolical possession as it is called—a proceeding which in

a law put them in possession as against the other parties to the suit but neither disturbed the appellant's possession nor affected his rights in any way. After trying in vain to obtain from Revenue Officers some order which would in effect dispossess the appellant, they made to the trial Court on 19th July 1934, the application in execution which is now before the Board in appeal. The Additional District Judge who dealt with this application was Mr. J. N. Haksar, and his order of 6th April 1934, was confirmed by Pollock and Digby JJ. in the High Court on 24th September 1937. It was ordered

b "that a fresh warrant of possession of four anna share of mouza Chipabad be given against Manakchand (the appellant) as representing the share that is mortgaged of Govindram and Rajaram excluding cultivating rights in the sir lands which were not mortgaged."

The reasons given in both Courts are to the same effect. The construction put upon the mortgage of 1919 in this execution proceeding is contrary to that given by the Judge who tried the suit; the security thereby granted being held to comprise the four annas interest of Govindram as mortgagee under the deed of 1895. The reasoning to the contrary in the judgment of 24th August 1929, is treated as a merely incidental observation and not as a decision. It was said in the High Court that there was nothing in the decree to indicate that the possession of the four anna interest in Chipabad which was decreed to the plaintiffs was subject to the rights of Govindram as a mortgagee. Both Courts purport to interpret the foreclosure decree by the mortgage deed. But whereas the first Court says that it is necessary to look to the pleadings and judgment and the mortgage deed itself, the High Court say: "Reading the pleadings, the mortgage deed and the decree as a whole we think that the decree was properly interpreted" by the first Court. They further held that the appellant having taken title from Govindram after the date of the plaint was bound by the decree and was a representative of Govindram. For this they cited a decision of the Board in A. I. R. 1937 P. C. 260.¹

Their Lordships do not consider it necessary for the determination of this appeal that they should decide the important and by no means easy question of the meaning of the vernacular language of the deed of 1919 upon which Courts in India have differed. They think that the issue of a warrant of possession against the appellant was without justification and

that the Courts in India have committed a serious irregularity in putting the appellant to trial of his title on an application for the execution of this foreclosure decree.

It might seem unnecessary to elaborate the proposition that a party who is dismissed from a suit on the ground that he has no concern with it is no longer a party to the suit and is not bound by the decree.

No doubt if during the pendency of the foreclosure suit, the appellant acquired from Govindram a right which was no more than an interest in the equity of redemption he would be bound by the decree. But that was not the claim of right by which he was defending his possession. It was decided by the order of 24th September 1928, to treat his claim as being "outside the controversy of the suit"—to use the language of Sir Lawrence Jenkins in 47 I. A. 11² at p. 15. The Court acted on the principle that his claim to a paramount title—be it right or wrong—would be in no way prejudiced by any foreclosure decree that might be passed. If he was right in his contention as to the interests comprised in the mortgage of 1919 the doctrine of *lis pendens* did not apply. In these circumstances it seems contrary to the order of 24th September 1928, that the decree should be executed against him as a person who was bound by it; and if he was claiming in good faith to have a right of possession not affected by the mortgage of 1919 he could not be ejected on any other footing (*cf.* O. 21, R. 99) save by an independent suit. But independently of these objections a proper construction of the foreclosure decree seems to their Lordships to afford to the respondents no basis for their claim to eject the appellant under it. Their Lordships cannot accept as correct the method adopted or the result arrived at by the Indian Courts. The question is not one of *res judicata* but of the meaning of the decree which these Courts were asked to enforce. The trial Judge had rejected the argument that the mortgage was void by holding that it did not include Govindram's right as mortgagee. *Non constat* that he would have decreed the suit if he had thought these rights to be included. Yet the appellant is to be ejected by proceedings in which it is not open to him to question the validity of the mortgage or the correctness of the decree. The High Court say that they interpret the decree by the mortgage deed and by the pleadings; and doubtless these documents will sometimes throw light on the meaning of a mortgage

1. ('37) 24 A. I. R. 1937 P. C. 260 : 169 I. C. 657 : 31 S. L. R. 652 (P. C.), Parmeshari Din v. Ram Charan.

2. ('20) 7 A. I. R. 1920 P. C. 81 : 55 I. O. 959 : 47 Cal. 662 : 47 I. A. 11 (P. C.), Radha Kishen v. Kurshed Hossein.

a decree. What use the High Court have made of the pleadings in this case is not quite clear but the use which they have made of the mortgage deed is only too plain. They find that the Judge's construction was erroneous and they construe his decree by an interpretation which he had expressly rejected. He had said in his judgment :

"I thus conclude that the prior mortgage is not included in the mortgage in suit and that four annas share of each of the villages Chipabad and Basantpura are mortgaged."

The words inserted in the schedule to the decree repeat the latter part of this sentence and though chosen by him — not very happily, it is true—to show that certain rights were not mortgaged are now interpreted as including those in the security—and that as against the appellant who had no say whatever in the drawing up of the decree. Such a result casts doubt upon the method by which it is reached. Under the Code the decree is the formal expression of the adjudication (S. 2) : it is imperative that it should conform to the judgment (O. 20, R. 6) : every Court has power to amend its decree so as to carry out its own meaning (cf. S. 152). For the purpose of interpreting a decree no other document is so directly in point as the judgment or can in the nature of things have comparable force.

Their Lordships are of opinion that the order to eject the appellant was irregular and unjustified. They will humbly advise His Majesty that this appeal should be allowed ; that the orders of the Courts in India dated 6th April 1934 and 24th September 1937, be set aside ; and that the respondents' application in execution dated 19th July 1933, be dismissed as against the appellant Manakchand. The respondents will pay the appellant's costs in both Courts in India and his costs of this appeal.

R.K.

Appeal allowed.

Solicitors for Appellant — T. L. Wilson & Co.

Solicitors for Respondents —

Hy. S. L. Polak & Co.

A. I. R. (31) 1944 Privy Council 50

(From High Court in Prize, England)

1st November 1943

LORDS ATKIN, THANKERTON, WRIGHT,
PORTER AND MERRIMAN

In the matter of part cargo ex S. S.

"Monte Contes"

Conservas Cerqueira Limitada —

Appellants

v.

*H. M. Attorney-General and Proctor for
Gibraltar — Respondent.*

Privy Council Appeal No. 40 of 1942.

(a) Shipping—Prize—Prize Law—Rules of—
Essentials to be proved by captor and claimant
indicated.

The Prize law has its own peculiar rules which have been developed out of the peculiar character of the issues to be determined and of the circumstances in which they arise and come before the Court. Under the Prize law it is not for the Crown as captor to establish affirmatively that the goods seized are subject to be condemned. Captors are entitled to seize property, ship or goods if there is reasonable ground for suspicion that the property is subject to be condemned. The property must be brought by captors for adjudication into the Prize Court by means of the issue and service of a writ. Persons claiming to be interested in the property may then enter appearance and file a claim. To succeed in their claim they must prove their title to the property and establish that the facts are such that there is no cause to justify condemnation. Thus the captors must show that the case is one involving reasonable suspicion. If they do so and if no claim is made, or if the claim fails, the Court will in due course condemn the property as prize. But on the side of the claimants positive proof to the satisfaction of the Court is exacted. They have to prove that they are entitled to the release of the goods as being their property, and also that the facts are such that there is nothing which would render the property good and lawful prize. In other words they must show by affirmative evidence that the reasonable suspicions were unfounded : ('43) 30 A.I.R. 1943 P. C. 54 and 1918 A. C. 461, *Rel. on.*

[P 51g,h; P 52a]

(b) Shipping — Prize — Prize Law — Goods seized as conditional contraband—Essentials to be proved by either side indicated—Analogy of English law that person is presumed to be innocent until proved guilty does not apply.

Where goods are seized as conditional contraband the captor has to maintain his seizure by showing the case of reasonable suspicion in order to justify what he did. The claimant has to establish by evidence of fact his affirmative case by showing the precise character of the adventure and showing that the ostensible destination is the ultimate destination. When the ground of condemnation relied upon by the captor is that the goods are conditional contraband, that is, are food stuffs proceeding to an enemy destination for the use of the enemy armed forces or the enemy Government it is not that claimants have to prove a negative, but they have to prove affirmatively what was the actual destination of the goods and that it was such that they were not subject to the penalty of being condemned. In other words, if the Court is of opinion that there was reasonable cause for seizing the goods, the claimants have to prove that the ostensible destination was the ultimate destination of the adventure so far as they controlled or could control it. The claimants need not prove that the articles will not find their way in one manner or another into enemy territory after they have been imported into the neutral country where their destination is alleged to be because though seizure may be justified on the ground of suspicious circumstances for which the claimant could not be held responsible, it is different with condemnation, which in general would not be ordered because of an ulterior destination in respect of which the shippers were neither responsible nor privy : 1918 A. C. 173, *Rel. on.*

[P 52b,c,d,e]

The analogy of the English criminal law that a man is presumed to be innocent until he is proved guilty cannot be applied in these cases for many reasons. One is that it is not a criminal offence for a

a neutral to carry contraband, though the goods may suffer the penalty of confiscation. The other is that Prize Courts have adopted their own rules. The claimant is not a prisoner on his trial, but a party who appears to establish his own case that the goods should be released to him. After all, the claimant who knows the true facts is the person who can dissipate the suspicion, if the circumstances are such that he can do so. If he is to succeed in his claim it is for him to satisfy the Court. [P 54b,c]

(c) Shipping — Prize — Prize Law — Seizure of goods as conditional contraband—Facts constituting reasonable suspicion justifying seizure indicated.

b Where there is a question of contraband a bill of lading "to order" or a shipping document which does not specify a consignee at the neutral port whose identity and responsibility can be investigated is in itself a suspicious circumstance justifying seizure of the goods; even a named consignee may turn out to be merely a cover for an enemy agent. Where, however, no consignee is named at all, the goods remain under the control of the shipper. There is then no clue as to the person by whom they will be dealt with at the neutral port which is the ostensible destination or in what manner they will be dealt with. In war time a prudent shipper would realise that the failure to name a consignee, whose identity and position in the neutral port can be investigated, is a defect in the ship's papers, which will normally be regarded in a Prize Court as a subject of reasonable suspicion. It is a further matter of adverse suspicion that there was no navicert for the goods. This document would normally be attached to the manifest, if there had been a manifest, and even if it is not obligatory in the case of a coasting voyage (such as a voyage from c Vigo to Barcelona) to procure it would at least be a natural and ordinary precaution. The absence however of a navicert, which might have been given in a proper case if applied for, may fairly be regarded as in some degree a further element of suspicion.

[P 52g,h; P 53a,b]

(d) Shipping — Prize — Prize Court — Facts of which Prize Court may take judicial notice indicated.

d Matters of common notoriety in a state of war can be taken judicial notice of by the Judge in a Prize Court. In the case of seizure of goods as conditional contraband the Prize Court can take judicial notice of the various devices used to cover the conveyance of contraband to an enemy destination particularly where the adventure involves a continuous voyage beyond the ostensible to the actual destination. The Court is entitled to take notice that a large consignment of food stuff (3428 cases of tinned fish valued at about £ 10,000) is to be regarded as calculated to increase the total war effort of the enemy, whether as intended to be actually supplied to the armed forces or for feeding the civil population behind the lines. The Court can also take notice that if there is a decree in the neutral country forbidding export of contraband to the belligerent countries, such decree may be, and frequently is, subject to evasion. The Court can also take judicial notice of a particular place as the war base of supplies in the enemy country and the practice of the enemy country to receive contraband goods for its own use or for disposal in whatever way would best help the war effort : 2 C. Rob. 343, *Rel. on*; 1923 A. C. 191, *Ref.*

[P 53e,f,g,h; P 54a]

G. Payl — for Appellants.

Wm. A. Crumo & Son — for Respondent.

Lord Wright. — This is an appeal from e an order of the Supreme Court of Gibraltar, Admiralty Jurisdiction—In Prize, condemning a part cargo of 3428 cases of tinned fish valued at approximately £10,000, shipped on board the Spanish steamship "Monte Contes" at Vigo for Barcelona. The shipment was made on 24th November 1941. On 16th December 1941, the goods were seized in Gibraltar, and on the same date a writ was issued and served on the vessel, claiming their condemnation on the ground (inter alia) of enemy destination. On 25th February 1941, a claim was entered on behalf of the owners of the goods, now represented by the present appellants and the underwriters, on the ground f (inter alia) that the goods were destined for Barcelona and were not going to an enemy destination. The Court rejected the claim and condemned the goods as lawful prize on the ground that they were conditional contraband destined for an enemy country, namely, Italy.

The case is marked by a paucity of information. If it was for the Crown as captor to establish affirmatively that the goods were conditional contraband, it might well be that the proof was insufficient. But that is not the true position in prize law. Prize law has its own peculiar rules, as the Board recently g explained in 1942 A. C. 667.¹ These peculiar rules have been developed out of the peculiar character of the issues to be determined and of the circumstances in which they arise and come before the Court. Captors are entitled to seize property, ship or goods if there is reasonable ground for suspicion that the property is subject to be condemned. The property must be brought by captors for adjudication into the Prize Court by means of the issue and service of a writ. Persons claiming to be interested in the property may then enter appearance and file a claim. To succeed in their claim they must prove their title h to the property and establish that the facts are such that there is no cause to justify condemnation. Thus the captors must show that the case is one involving reasonable suspicion. If they do so and if no claim is made, or if the claim fails, the Court will in due course condemn the property as prize. But on the side of the claimants positive proof to the satisfaction of the Court is exacted. They have to prove that they are entitled to the release of the goods as being their property, and also that the facts are such that there is

1. ('43) 30 A. I. R. 1943 P. C. 54 : 207 I. C. 452 : 1942 A. C. 667 : 111 L. J. P. C. 126 : 167 L. T. 278 : 1 Ll. P. Cas. 99 : 58 T. L. R. 388 : (1942) 2 All. E. R. 453, *In re S. S. Prins Knud and Cargo*.

a nothing which would render the property good and lawful prize. In other words, they must show by affirmative evidence that the reasonable suspicions were unfounded. That these are the two issues in such cases was stated by this Board in 1918 A. C. 461² at p. 464, in the judgment delivered by Lord Parker.

b It will then be convenient to examine what the Crown as captor here alleges to constitute a case of reasonable suspicion, and on the other hand what facts the claimants allege or seek to establish in order to have the seizure set aside and the goods released. The contrast between the two sides is sometimes explained as depending on the onus of proof. In a sense that may be a true description. But more exactly the difference depends on what is the case of either side. The captor has to maintain his seizure by showing the case of reasonable suspicion in order to justify what he did. The claimant has to establish by evidence of fact his affirmative case, which he can do in a case like this by showing the precise character of the adventure and showing that the ostensible destination is the ultimate destination. In the present case the ground of condemnation relied upon is that the goods are conditional contraband, that is, c are food stuffs proceeding to an enemy destination for the use of the Italian armed forces or the Italian Government. It has not been contested that such a destination would render goods liable to be condemned. What is disputed is that there was in fact such a destination. It is not that claimants have to prove a negative, but they have to prove affirmatively what was the actual destination of the goods and that it was such that they were not subject to the penalty of being condemned. In other words, if the Court is of opinion, as the Chief Justice at Gibraltar was, d that there was reasonable cause for seizing the goods, the appellants have to prove that Barcelona was the ultimate destination of the adventure so far as they controlled or could control it. Their Lordships do not go so far as the Chief Justice when he said that the claimant must prove that the articles will not find their way in one manner or another into enemy territory after they have been imported into the neutral country. Their Lordships are not aware of any authority which would justify this statement in its full breadth. Though seizure may be justified on the ground of suspicious circumstances for which the claimant could not

be held responsible, it is different with condemnation, which in general would not be ordered because of an ulterior destination in respect of which the shippers were neither responsible nor privy: 1918 A. C. 173.³ But the decision of the Chief Justice is not affected by this point.

In their Lordships' judgment there were abundant circumstances to justify the finding of the Chief Justice that the consignment of tinned fish was subject to reasonable suspicion. In the first place the consignment was large in quantity and value. Tinned fish is a convenient and portable foodstuff peculiarly suitable for use by armed forces in the field. It could form a valuable addition to the food resources of Italy available to the Italian Government, which could direct it to the use either of the army or civil population. Barcelona was a convenient port for shipment along the coast to Italy. In addition to this obvious ground of suspicion, the shipping documents, to which in a Prize Court the preliminary investigations are directed, were of the most suspicious character. There was no manifest and no bill of lading in respect of the goods. What is called the mate's receipt did not give the name of the consignee. It is well established that where there is a question of contraband a bill of lading 'to order', or a shipping document which does not specify a consignee at the neutral port whose identity and responsibility can be investigated is in itself a suspicious circumstance; even a named consignee may turn out to be merely a cover for an enemy agent: 1918 A. C. 461.² Where, however, no consignee is named at all, the goods remain under the control of the shipper. There is then no clue as to the person by whom they will be dealt with at the neutral port which is the ostensible destination or in what manner they will be dealt with. In war time a prudent shipper would realise that the failure to name a consignee, whose identity and position in the neutral port can be investigated, is a defect in the ship's papers, which will normally be regarded in a Prize Court as a subject of reasonable suspicion. It is a further matter of adverse suspicion that there was no navicert for the goods. This document would normally be attached to the manifest, if there had been a manifest, and even if it is not obligatory in the case of a coasting voyage such as a voyage from Vigo to Barcelona, to procure it would at least be a natural and ordinary precaution. It is here

2. (1918) 1918 A. C. 461 : 87 L. J. P. 57 : 3 P. Cas. 60 : 14 Asp. M. C. 233 : 118 L. T. 274 : 34 T.L.R. 222, *The Louisiana*.

3. (1918) 1918 A. C. 173 : 87 L. J. P. 11 : 3 P. Cas. 17 : 14 Asp. M. C. 178 : 117 L. T. 743 : 34 T.L.R. 106, *The Baron Stjernblad*.

a unnecessary to rely on Arts. 2 and 3 of the Order in Council, Reprisals; German and Italian Restriction (Statutory Rules and Orders 1940, No. 1436, dated 31st July 1940), in particular Art. 3, sub-cl. (1), which provides that goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, should, if not covered by a valid navicert, be deemed to have an enemy destination until the contrary is established. The Chief Justice did not found his decision on the Order in Council, nor do their Lordships. The absence however of a navicert, which it was admitted the Vice-
 b Consul at Vigo might have given in a proper case if applied for, may fairly be regarded as in some degree a further element of suspicion. Their Lordships do not therefore need to consider questions which might be raised as to the validity and effect of the Order in Council. One further circumstance of suspicion may be mentioned, that is the strip of paper which was wrapped round the sides of the tins. The tins themselves had printed on the metal a description of the contents in various languages, including English, Italian and others. This is not a matter which could call for comment. But the superimposed paper wrap-
 c per had a description only in Spanish and Italian. This may be taken to contemplate the probability that the tins would go to Italy. It would not in itself raise a case of reasonable suspicion, though it does also to some extent go to support the other elements which point to an Italian destination.

Their Lordships are of opinion that the various circumstances to which they have adverted constitute a very strong case of reasonable suspicion. It must now be seen how the appellants claim to show that Barcelona was not merely the ostensible but, so far as rested on the appellants, the ultimate destina-
 d tion of the goods. The proper witness to prove that the real object of the adventure was to send the goods to a destination other than the enemy in Italy was the responsible representative of the claimant company. He could have produced any contracts under which the goods were shipped and correspondence with consignees or buyers or agents for disposal of the goods in Barcelona. He could have explained the circumstances which led to the shipment, the nature of the market or demand for tinned fish in Barcelona, and that such a shipment was made in the ordinary course of trade. No such person was called. No such evidence was given by anybody. The evidence which was given that tinned fish was labelled in different languages relates merely to a not

very important aspect. In truth there was nothing that could fairly be regarded as affirmative evidence to dissipate the suspicious character of the case or to show that Barcelona was intended or contemplated by the appellants as the real and ultimate destination.

Their Lordships therefore see nothing to justify them in differing from the judgment of the Chief Justice condemning the cargo of 3,428 cases of tinned fish as destined for Italy and as conditional contraband. The Court is entitled to take notice that a large consignment of foodstuff such as that in question is to be regarded as calculated to increase the total war effort of Italy, whether as intended
 y to be actually supplied to the armed forces or for feeding the civil population behind the lines. The Court can also take notice that if there is, as suggested, a Spanish decree forbidding export of contraband to Italy, such decree may be, and frequently is, subject to evasion.

Counsel for the appellants has contended that a decision against the appellants can only be based on findings of fact which go beyond the legitimate limits of judicial notice, and has relied on certain observations in (1923) A. C. 191,⁴ to the effect that though the Court may take judicial notice of the existence of a
 9 state of war between this country and another, it may not take judicial notice of particular facts. The argument appears to be that judicial notice could not be taken of facts such as the position of Genoa as a war base of supplies in Italy, or a practice of the Italian Government, as ruler of a totalitarian State, to take the goods for its own use or for disposal in whatever way would best help the war effort. No doubt these and similar matters must be considered before the Court can arrive at a case of reasonable suspicion. But in their Lordships' opinion these are matters
 h of common notoriety which, as on one occasion Lord Stowell said, could be acted upon by the Judge in a Prize Court. Similarly in 2 C. Rob. 343,⁵ Lord Stowell said of the duty of Judges of Prize Courts,

"they are not to shut their eyes to what is passing in the world Not to know these facts as a matter of frequent and not unfamiliar occurrence would be not to know the general nature of the subject upon which the Court has to decide : not to consider them at all would not be to do justice."

Lord Stowell was there dealing with the various devices used to cover property of the

4. (1923) 1923 A. C. 191 : 92 L. J. K. B. 142 : 128 L. T. 546 : 28 Com. Cas. 296 : 16 Asp. M. C. 33, Commonwealth Shipping Representative v. P. & O. Branch Service.

5. 2 C. Rob. 343, Rosalie and Betty.

a enemy. The same may be truly predicated of the devices used to cover the conveyance of contraband to an enemy destination, particularly where the adventure involves a continuous voyage beyond the ostensible to the actual destination. The present case strikingly illustrates how helpless a Prize Court would be but for the rules which it has developed of proceeding in the first stage on reasonable suspicion based largely upon its experience of "the general nature of the subject." A shipper who made the shipping documents meagre and uninformative and abstained from giving evidence at the trial would get away with the goods but for the rules on which the Court acts. The analogy of the English criminal law that a man is presumed to be innocent until he is proved guilty cannot be applied in these cases for many reasons. One is that it is not a criminal offence for a neutral to carry contraband, though the goods may suffer the penalty of confiscation. The other is that Prize Courts, for good reasons as already explained, have adopted their own rules. The claimant is not a prisoner on his trial, but a party who appears to establish his own case that the goods should be released to him. After all, the claimant who knows the true facts is the person who can dissipate the suspicion, if the circumstances are such that he can do so. If he is to succeed in his claim it is for him to satisfy the Court. In the result, in their Lordships' judgment the decree of the Chief Justice should be upheld and the appeal dismissed with costs. They will humbly so advise His Majesty.

G.N.

Appeal dismissed.

Solicitors for Appellants —

*The Solicitor General, W. Price.*Solicitors for Respondent — *Treasury Solicitor.***A. I. R. (31) 1944 Privy Council 54***(From Madras)*

23rd February 1944

LORD MACMILLAN, LORD WRIGHT
AND SIR GEORGE RANKIN*K. R. Easwaramurthi Goundan*
Appellant

v.

Emperor.

Privy Council Appeal No. 1 of 1943.

(a) Penal Code (1860), S. 216—Ingredients of offence laid down.

Section 216 requires, if the offence is to be established, first that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly knowledge by the accused party of the order, thirdly the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended. [P 55e]

Penal Code —

('40) Ratanlal, Page 552.

('36) Gour, Page 759.

(b) Penal Code (1860), S. 216 — "Knowing" and "having reason to believe" difference explained—Latter words cannot be read in S. 216—Such reading vitiates conviction and sentence.

The word "knowing" in S. 216 means something more than and different from the words "had reason (or sufficient cause) to believe." The latter words might be satisfied even though no warrant had in fact been issued. "Knowing" however implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. The proclamations could not be deemed to establish that the accused "knew" of the issue of the warrants. The distinction between "knowing" and "having reason to believe" cannot be disregarded. To read S. 216 as if it contained the latter words would vitiate the judgment, conviction and sentence. [P 57b,c]

Penal Code —

('40) Ratanlal, Pages 551-552.

('36) Gour, Pages 759-760.

(c) Criminal P. C. (1898), S. 87 — Proof of proclamation is no proof of warrant—Warrant must be proved by original or certified copy — S. 87 does not override Evidence Act.

A warrant of arrest is a public document which affects the personal liberty of the subject. The statute prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. Section 87 (3) does not override the requirements of the Evidence Act or make the proclamation evidence that the warrants had been issued. The method of proving the warrants is not a requirement of S. 87 which is merely dealing with the proclamation itself and the mode of publishing it and the like. Nor does S. 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents, even to the inhabitants of the town or village where it is published. There can be no proof that the accused knew of the orders or warrants of arrest, unless or until the issue of the warrants has been proved. The mere fact that the proclamation was made under S. 87 cannot make the proclamations legal evidence of the issue of the warrant or order of arrest, nor is there anything in S. 87 which makes it possible to impute to the accused notice of the proclamations or their terms. [P 56f,g; P 57d,e,f,g]

(d) Privy Council—Criminal appeal—Special leave — Miscarriage of justice is test for interference.

In a criminal appeal brought by special leave of His Majesty in Council, their Lordships are not concerned with formal rules, but only with the question whether there has been a miscarriage of justice. [P 57h]

D. N. Pritt and R. K. Handoo — for Appellant.*G. D. Roberts and S. P. Khambatta* —

for Respondent.

Lord Wright—The appellant, a wealthy landowner, merchant and banker with large interests in Tiruppur, where he resided, and other places in the Province of Madras, was

a charged along with ten other persons under S. 216, Penal Code, with the offence of "harbouring" two persons who were suspected of having committed a murder on or about 8th March 1940. The murdered man was Muthu Goundan, of Othuvillaipudur. The police formed the opinion that the murder was committed by four persons, all of them Valayans, a low tribe among the depressed and criminal classes of Madras, aided and abetted by one R. V. I. Goundan, the father-in-law of the appellant. Two of these four Valayans are the persons whom the accused was said to have "harboured." These men, along with b R. V. I. Goundan, being subsequently tried for the murder or abetment, were acquitted. Of the eleven men later charged with "harbouring," ten including the appellant were convicted by the Sub-divisional Magistrate who tried the case, the appellant being sentenced to six months' rigorous imprisonment and a fine of Rs. 1000, with a further three months' rigorous imprisonment in default of paying the fine. On appeal, the Sessions Judge set aside all the convictions and sentences. On a further appeal by the prosecution from the orders of acquittal, Horwill J., who heard the appeal in the High Court of Madras, confirmed c all the acquittals except that of the appellant; as to him, the Judge restored the conviction and sentence passed by the Sub-divisional Magistrate. Special leave to appeal was granted to the appellant by His Majesty in Council. In the result, as will appear later, their Lordships arrived at the opinion, on the conclusion of the arguments, that the appeal should be allowed on the ground that there was no evidence admissible in law to prove the essential foundation of the case for the prosecution, namely, that any order had ever been made for the arrest of the two men said to have been "harboured." In view of d the decisive character of this objection to the conviction, it will be enough here to summarise as shortly as possible the material facts and to outline the course which the proceedings below took. First, however, the terms of S. 216 must be set out. That section is in the following terms :

"Section 216.— . . . whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such . . . order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person . . . is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; . . ."

The section requires, if the offence is to be established, first that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly knowledge by the accused party of the order, thirdly the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended. The character of a warrant of arrest is defined in S. 75, Criminal P. C., 1898, as follows :

"Section 75. — (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench; and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed."

The form prescribed for such a warrant is set out in Sch. 5 of the Code.

"Schedule V. Form II.—Warrant of Arrest.
(See Section 75.)

To (name and designation of the person or persons who is or are to execute the warrant) whereas of stands charged with the offence of (state the offence), you are hereby directed to arrest the said and to produce him before me. Herein fail not.

Dated this day of 19 .
(Seal.)"

A warrant or order of this character is a public document, and the conditions necessary to prove it are prescribed in Ss. 62, 64 and 65, Evidence Act, which are in the following terms :

"62. Primary evidence means the document itself produced for the inspection of the Court.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or, of any person legally bound to produce it,

and when, after the notice mentioned in S. 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily moveable;

(e) when the original is a public document within the meaning of S. 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(g) when the originals consist of numerous accounts of other documents which cannot conveniently be

a examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

The ten persons charged together with the appellant were (1) the pattagar or proprietor of an estate at Palayakottai, in the grounds of which the two suspected Valayans were eventually arrested, and eight other persons b who were servants of the pattagar, the appellant and another person said to have assisted the appellant. The appellant was arrested on 29th September 1940, the pattagar and the others arrested with him having been arrested on 23rd August 1940. The charge against the appellant was in due course framed by the Sub-divisional First Class Magistrate of Coimbatore. It was dated 18th January 1941, and was in the following terms :

"That on or about the 13th day of July 1940, Soratta Valayar, son of Vettai Valayar, and Kooralayar, son of Alaga Valayar, were ordered to be apprehended for an offence under S. 302, by the Sub-Magistrate, Udumalpet, a public servant in the exercise of his lawful powers as such public servant, and c that you knowing of the said order for apprehension on or about the 22nd day of August 1940, at Palayakottai harboured the said Soratta Valayar and Kooralayar with the intention of preventing them from being apprehended and thereby committed an offence punishable under S. 216, Penal Code, and within my cognizance."

The charge referred to an order, though without giving any precise date for it. It specified the place and date of the offence and alleged that the accused knew of the alleged order before the date of the alleged offence, which was said to have been committed on or about 22nd August 1940. It is clear that it was necessary for the prosecution to establish that d before that date the order existed and was known to the appellant, and that the acts amounting to harbourage were done by the appellant with that knowledge. The prosecution sought to prove both that the warrant of arrest had been issued and that the appellant knew of its issue by means of two proclamations, one in respect of each of the two suspected Valayans. These were except for the name of the particular suspect in identical terms. It will be enough to quote one of them.

"In the Court of the Sub-Magistrate, Udumalpet

R. C. XI of 1940 *Calendar Case*.

Whereas complaint has been made before me that Soratta Valayan, son of Sellappan alias Vettai Valayan, Nallur, Palladam Taluk, has committed (or is suspected to have committed) the offence of murder,

punishable under S. 302, Penal Code, and the warrant of arrest issued was returned with the endorsement that the said Soratta Valayan could not be found and whereas it has been shown to my satisfaction that the said Soratta Valayan has absconded (or is concealing himself to avoid the execution of the said warrant);

Proclamation is hereby made that the said Soratta Valayan is required to appear at Udumalpet Camp before this Court, to answer the said complaint on 18th August 1940, at 10 A. M.

Dated this 5th day of July 1940.

(Signed) JOHN A. SAMUEL,
Sub-Magistrate."

There was no evidence at all in this case to show that the proclamations or either of them came to the knowledge of the appellant, f or that he had ever visited Nallur, or that it was reasonable to assume that he had done so, or (apart from the evidence of his alleged association with the two Valayans) that he had ever associated with the type of person usually to be found in a Valayan village.

It is obvious that there could not be proof that the appellant knew of the orders or warrants of arrest, unless or until the issue of the warrants had been proved. The proclamation was made under S. 87, Criminal P. C., but there is in their Lordships' opinion, as will be explained later, nothing in that section which makes the proclamations legal evidence of the g issue of the warrant or order of arrest, nor is there anything either in S. 87 or in the facts of the case which makes it possible to impute to the appellant notice of the proclamations or their terms. This makes it unnecessary to comment on the curious fact that the date of the warrants of arrest given in the proclamations (5th July 1940) differs from the date given in the charge (on or about 13th July 1940). It will not be surprising that the same vagueness as to dates recurs in the evidence called to establish the "harbouring." There was some discussion as to what were the dates of the various occurrences spoken to by the evidence, but there is in their Lordships' opinion h no evidence to show that there ever were the orders or warrants proof of which was essential to the prosecution's case, so that it will not be necessary to make any meticulous examination of the evidence. It is sufficiently clear in their Lordships' opinion that the Sessions Judge was right in his conclusion on this aspect of the case, which was in effect that even on the prosecution's evidence the appellant brought the Valayans to the pattagar's compound nearly four months before the proclamations were issued and was not said to have associated with them at that place later than six weeks before the proclamations. The Sessions Judge in his judgment pointed out that

although the necessary warrants or orders had not been filed, he nevertheless felt justified in inferring from the terms of the proclamations that they had been issued. On this point their Lordships are unable to agree with the Sessions Judge for reasons to be stated later. But they do agree with his conclusion that, even assuming, as he did, that the warrants had in fact been issued, it had not been proved that the appellant knew of them. He went on to emphasise the difference between the positive word "knowing" used in S. 216 and the words "has reason to believe" as used in S. 212 of the Code as an alternative to "knows." He also referred to the definition of "has reason to believe" in S. 26 of the Code as meaning "having sufficient cause to believe." In their Lordships' opinion the Sessions Judge was right in holding that the word "knowing" meant something more than and different from the words "had reason (or sufficient cause) to believe." The latter words might be satisfied even though no warrant had in fact been issued. "Knowing," however, implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. The Sessions Judge also held that the proclamations could not be deemed to establish that the appellant "knew" of the issue of the warrants. He accordingly held that the appellant should be acquitted.

Horwill J. on appeal reversed that decision. It is not necessary to examine his analysis of the evidence of fact. It is enough to say that their Lordships prefer in general that of the Sessions Judge. But he, erroneously, as their Lordships think, treated the objection that the issue of the warrants had not been proved as a "technical" objection, and he rejected or disregarded the distinction between "knowing" and "having reason to believe." He read S. 216 as if it contained the latter words. These two errors are, in their Lordships' opinion, sufficient to vitiate his judgment and the resulting conviction and sentence.

But their Lordships think that the appeal should be allowed on the single ground that there is no evidence that the warrants or orders were ever issued. Sections 62, 64 and 65, Evidence Act, define the only evidence which the law permits in order to prove a warrant of arrest, and that is under S. 62 of the Act production of the original order, or, under the conditions specified in S. 65, of a certified copy. A warrant of arrest is a public document which affects the personal liberty of the subject. The statute as quoted above prescribes its form. It has to bear the appropriate signature and seal.

Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. But it is unnecessary to emphasise this point. The objection taken on the appellant's part is not technical but substantial. Mr. Roberts, the able counsel for the Indian Government, did not in the end contest its validity. Indeed, he said that the Indian Government would not countenance any relaxation of the stringency in regard to warrants of arrest of ss. 62 and 65.

It is sufficient to refer briefly to an argument based on sub-s. (3) of S. 87, the words of which are as follows :

"(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

Their Lordships cannot read these words as overriding the requirements of the Evidence Act or as making the proclamation evidence that the warrants had been issued. The method of proving the warrants is not a requirement of the section which is merely dealing with the proclamation itself and the mode of publishing it and the like. Nor does S. 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents, even to the inhabitants of the town or village where it is published.

Some reference was made to the rule relating to concurrent findings of fact in the Court below. If that rule applied at all, it would involve concurrent findings in all the Courts below, whereas here there are such findings in only two out of three. But in a criminal appeal brought by special leave of His Majesty in Council, their Lordships are not concerned with formal rules, but only with the question whether there has been a miscarriage of justice, as in their opinion for the reasons given there has been in this case.

In their judgment the appeal should be allowed and the conviction set aside.

They will humbly so advise His Majesty.

R.K.

Appeal allowed.

Solicitors for Appellant—*Douglas Grant & Dold.*

Solicitors for Respondent —

Solicitor, India Office.

* * A. I. R. (31) 1944 Privy Council 58

(*From Calcutta:*
(1942) 29 A. I. R. 1942 Cal. 562)

18th May 1944

VISCOUNT MAUGHAM, LORD MACMILLAN
AND LORD WRIGHT

Bank of Baroda, Ltd. — Appellant

v.

Punjab National Bank, Ltd. and others
— *Respondents.*

Privy Council Appeal No. 11 of 1943.

(a) Custom — Law-merchant.

The law merchant is not a closed book nor is it fixed or stereotyped: (1875) 10 Ex. 337, *Ref.*

[P 60 C 1]

* * (b) Negotiable Instruments Act (1881), S. 7 — Cheque — Certification of — It is not acceptance in absence of custom treating it as acceptance: (1942) 29 A.I.R. 1942 Cal. 562, *REVERSED.*

In the case of a cheque acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. The liability depends on the contractual relationship between the bank and the drawer, its customer. Other things being equal, in particular, if the customer has sufficient funds or credit available with the bank the bank is bound either to pay the cheque or dishonour it at once. But if the bank (at least at the drawer's request), accepts the cheque, he should be entitled to protect himself as against his customer by setting aside the appropriate funds standing to the customer's credit. Marking or certification of a cheque is not an acceptance. It is essentially different in its nature and effects in the absence of a custom treating certification as an acceptance. (1942) 29 A.I.R. 1942 Cal. 562, *REVERSED.*

[P 60 C 2; P 61 C 1]

[Difference between cheque and bill of exchange explained.] *Case law (Foreign) considered.*

* (c) Negotiable Instruments Act (1881), S. 7 — Cheque — Certification of — Effect and enforceability — Essentials for, stated.

In order to see whether a certification of a cheque is by the banker, the certification must be construed according to the proper meaning of the words used in their setting and independently of the doctrine of negotiability, which is the creation of legislation or established usage. The question is whether the words read in their context, that is, as appearing on a cheque, import a promise by the certifying bank to pay the amount of the cheque whether or not there are funds to meet it, and if they do, whether there is any privity of contract between the holder and the certifying bank and if there is whether there is consideration for the promise as between these parties. The holder must show privity of contract between himself and the bank and that there was passing of consideration between them. The words of the certification might be construed as words of representation, as to the genuineness of the cheque and of the signature. If the cheque had not been post-dated, the certification might also be held to include a representation as to the then sufficiency of the drawer's account. But if the cheque be not due for payment until seven days later, a representation as to the then position would not go very far. If it was to be construed as a representation that on the due date there would be funds available, it necessarily amounted to a promise and the want of consideration

would be fatal to its enforceability. The promise, if any, was a non-negotiable gratuitous promise. From the point of view of a Court of law, a gentlemen's agreement or honourable obligation, however important in business, has no validity. [P 63 C 2; P 64 C 1]

(d) Negotiable Instruments Act (1881), S. 7 — Cheque Certification — Custom held not established in India.

The practice of certifying cheques is not judicially or legislatively established in India. [P 64 C 2]

Sir T. Strangman and J. M. Pringle —

for Appellant.

D. N. Pritt and S. A. Kyffin — for Respondents.

Lord Wright.—The appellant is a company doing banking business, established in the State of Baroda, under the Baroda Companies Act, 1896-97, and having its registered office in Baroda with branches in British India. The respondent is a bank incorporated under the Indian Companies Act. Both banks have branches in Calcutta. M. P. Amin was manager of the Calcutta branch of the appellant bank. Bhagwan Das was manager of the Calcutta branch of the respondent bank. One Mitter (respondent 2) became a customer of the appellant bank at Calcutta. In May 1939, one Ghose (respondent 3) opened an account with the appellant bank on the understanding that he should be allowed "temporary accommodation from time to time." That account was guaranteed by Mitter. On 13th June 1939, Ghose's account with the appellant bank showed an opening debit balance of Rs. 1,26,339 reduced during the course of the day to rupees 89,274. On the same date Mitter's account with the respondent bank was overdrawn to the extent of about Rs. 35,000. On that day, Mitter brought to the respondent bank two cheques drawn by Ghose on the appellant bank both in favour of Mitter and both dated 13th June 1939; both cheques were marked on their face with the words "Marked good for payment up to 20th June 1939," and signed by Amin on behalf of the appellant bank. One cheque was for Rs. 1,40,000 and the other for Rs. 1,35,000. Mitter informed Bhagwan Das that the cheques would not be paid until 20th June 1939, and asked to be allowed to draw Rs. 2,40,000 against them. Bhagwan Das said he wanted a cheque the date of which was the same as that on which payment was to be made. Mitter then took away the cheques and returned a little later on the same day with one cheque dated 20th June 1939, drawn by Ghose on the appellant bank in favour of Mitter or order, for Rs. 2,75,000. The cheque was crossed "& Co." and on the face of it were written crosswise the words "Marked good for payment on 20-6-39. For the Bank of Baroda Limited, M. P. Amin, Manager." It has not been questioned that the signature was that of Amin. Mitter endorsed the

cheque generally and handed it to Bhagwan Das, with two letters, in which he asked the respondent bank to credit Rs. 2,75,000 to his account "on realisation on due date," and also requested an overdraft of Rs. 2,40,000, besides the previous balance, which he promised to adjust on 20th June 1939.

The respondent bank on the same day gave Mitter its cheque for Rupees 2,40,000, on the Imperial Bank of India at Calcutta which Mitter duly cashed. The respondent bank debited Mitter's account with the amount. Meantime the appellant bank had become suspicious of the conduct of Amin and had sent two senior officials to keep Amin under observation. On 19th June, Amin was suspended and early next day a notice was sent to the respondent and other banks that Amin's power of attorney had been cancelled and another branch manager appointed. On 20th June, the respondent bank, who, though they had not yet received the notice, had become apprehensive, sent their cashier and their accountant to the appellant bank, as soon as it opened for business that morning, to present the cheque marked as above which Bhagwan Das had endorsed generally for Rs. 2,75,000, over the counter for payment. Ghose's account was then in credit to the extent of annas 7 pies 3 only. The appellant bank refused payment and returned the cheque with a memorandum attached "not arranged for." After some correspondence the respondent bank on 31st July 1939, commenced the present suit against the appellant bank, and also against Mitter and Ghose. As against the appellant bank, the respondents claimed as holders for value of the certified cheque, and also based their claim on a custom or usage, and in the alternative on estoppel. They claimed against Ghose as drawer and against Mitter as endorser. The two latter did not appear, nor did they give evidence at the trial; indeed they were then the subject, along with Amin, of criminal proceedings in connection with their part in the affair. It was not suggested that either Bhagwan Das or the respondent bank were actually party or privy to the fraud, however irregular from a banking point of view was the discounting of a post-dated cheque, quite apart from the original request to have a single cheque in place of the two brought in the first instance. It does not appear whether the cheque was post-dated at the request of the drawer, Ghose, or of Mitter. It seems that the amount of the cheque was not debited to Ghose's account and that there was no earmarking of funds or cover for it. Ghose's account, as already observed, was heavily overdrawn when the cheque was taken as security for the loan. It may be said that

the respondent bank was not affected by irregularities of indoor management on the part of the appellant bank's manager, of which they had no notice, but the fact that money was lent on the post-dated cheque on 13th June, though on its face it was only payable on 20th June, and was marked for payment on that date, was a departure obvious on the face of the cheque from any practice there might be in these matters. The respondent bank however made no inquiries, and did not question the validity of the certification or marking. The effect of this will be considered later.

At the trial before Panckridge J. the evidence called included some Calcutta bankers, who deposed on the question of there being a practice in Calcutta to mark or certify cheques, but it is clear that on any view there was no satisfactory evidence that it was usual to certify post-dated cheques. Panckridge J. held the appellant bank liable on the cheque on the ground that they were acceptors because in his judgment the certification constituted an acceptance within the meaning of the Negotiable Instruments Act, though he went on to hold as a further ground that the evidence showed that bankers at Calcutta are by usage liable on cheques certified by them when presented by parties entitled thereto. He did not deal specifically with the case that the cheques were post-dated.

On appeal the judgment of the trial Judge was affirmed. The Chief Justice who delivered the judgment of the Court decided the case on the ground that the marking or acceptance of the cheque was in law an acceptance by the appellant bank, and accordingly the question of usage did not arise. He said however that the evidence was insufficient to enable him to hold that the custom alleged was established. He was prepared to consider the evidence as showing that banks in Calcutta which mark cheques regard the certification as an acceptance which makes them legally liable to pay and that they honour their obligation. The Chief Justice did not deal at length with the objections to certifying post-dated cheques, though in the memorandum of appeal it was expressly urged that to certify a post-dated cheque was outside the manager's authority and was outside any custom or usage.

In the Court below the pleadings and issues were not very precise or formal, and before this Board the appeal has been presented and argued on the basis of the substantial issues.

The first and principal issue was whether the certification amounted to an acceptance within the definition contained in S. 7, Negotiable Instruments Act, 1881, which defines

an acceptor as the drawee of a bill of exchange who has signed his assent upon the bill, and delivered the same. By s. 6 a cheque is defined as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.

There is no provision in the Negotiable Instruments Act as to a post-dated instrument such as there is in the English Bills of Exchange Act, 1882, s. 13 (2), which says that a bill is not invalid by reason only that it is ante-dated or post-dated. There are certain differences between the English Act and the Indian Act, which preceded the former by a year. But substantially the two Acts correspond. Both have been based on the law developed by the English Courts as a part of the law-merchant, which the common law originally received on the basis of what was proved to the Court to be the custom of European business-men in their dealings, but which eventually, under the name of the law-merchant was integrated with and became a part of the common law. The law of negotiable instruments was peculiarly adapted to codification, because it was so largely precise and formal. Hence the English Act was described as a codifying Act, and so was in fact the Indian Act. Both were based on the English decisions and hence these and later decisions of either country are commonly cited and relied upon. And in addition decisions from other common law jurisdiction are frequently cited as in the present case is done by the Chief Justice. But the law-merchant is not a closed book nor is it fixed or stereotyped. This was explained by Cockburn C. J. in (1875) 10 Ex. 337¹ at page 346 and following pages. Practices of business men change, and Courts of law in giving effect to the dealings of the parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction. Hence evidence is admitted of custom and usage, which when juridically ascertained and established become incorporated in the common law. Thus, in the present case, there is an alternative claim based on custom and usage. But the contention that the certification was an acceptance of the cheque is primarily a question of law, to be decided on the terms of the Act and on the authorities upon a correct understanding of the characteristics of a cheque and of the effect of certification.

The main question falls into two parts: one is whether it is legally competent to accept a cheque as if it were a bill within s. 7, Negotiable Instruments Act, 1881, and 1. (1875) 10 Ex. 337, *Goodwin v. Roberts*.

the other is whether certification constitutes an acceptance. Now it is to be noted that so far as their Lordships know there is no case in the books of the acceptance of a cheque. This is an arresting fact at the outset, especially when the myriad cheques which have been drawn and paid during all these years are considered. The reason why a contrast is drawn between the acceptance of a cheque which is a bill of exchange of a special type and the acceptance of an ordinary bill of exchange depends on the distinction in fact between a bill of exchange and a cheque, which are in many respects different and distinct in their character and origin: *see* (1875) 10 Ex. 337¹ at p. 346, though in many respects they are analogous. In 9 Moo. P. C. 46² at page 69, this Board on an appeal from the Supreme Court of Calcutta in a judgment delivered in 1854 by Parke B. pointed out some of the essential differences: he said that a cheque is a peculiar sort of instrument, in many ways resembling a bill of exchange, but in some entirely different. He said that in the ordinary course it is never accepted: it is not intended for circulation, it is given for immediate payment, it is not entitled to days of grace. In addition, it is to be noted, a cheque is presented for payment, whereas a bill in the first instance is presented for acceptance unless it is a bill on demand. A bill is dishonoured by non-acceptance; this is not so in the case of a cheque, because the holder of a cheque, as between himself and the drawer, has no right to require acceptance. These essential differences (besides others) are sufficient to explain why in practice cheques are not accepted. Acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. The liability depends on the contractual relationship between the bank and the drawer, its customer. Other things being equal, in particular if the customer has sufficient funds or credit available with the bank the bank is bound either to pay the cheque or dishonour it at once. There is no point in its saying in effect to the drawer or indeed to the holder if it has been transferred, "I will pay if you present it again." It is different in the case of an ordinary bill; the drawee is under no liability on the instrument until he accepts; his liability on the bill depends on his acceptance of it. As between the drawer and his bank, acceptance of a cheque is superfluous. It would be merely a confirmation of the contractual liability of the bank to honour the customer's orders to pay. The customer's right to draw a cheque depends on his having satisfied the contractual

2. (1854) 9 Moo. P. C. 46, *Ramchurn Mullick v. Luchmeechund Radakissen*.

conditions which require the bank to honour his mandate to pay the cheque. But if the bank (at least at the drawer's request), accepts the cheque, he should be entitled to protect himself as against his customer by setting aside the appropriate funds standing to the customer's credit. The change in the position of all parties which would follow on the acceptance of a cheque if regarded as an acceptance under the Act has led the highest English authorities to lay it down that cheques are not the proper subject of acceptance, or at least to say, as Chalmers stated at p. 292 of Edn. 10 of the Bills of Exchange Act, that "a cheque is not intended to be accepted," though he adds "at common law there is no objection to the acceptance of a cheque if the holder likes to take it in lieu of payment." These latter words emphasise the difference for this purpose between a bill and a cheque, and also explain why cheques are not in practice accepted. In (1908) 1 K. B. 13³ at p. 18, Lord Alverstone L.C.J. said: "In ordinary parlance there is no acceptor of a cheque." It seems that on special occasions bankers do accept cheques drawn on themselves so as to make them payable at one of their clearing bankers, they themselves not being members of the Bankers' Clearing House, but this is rare and exceptional. Both Chalmers (*loc. cit.*) and Paget, on Banking, Edn. 4, p. 164, are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form be disregarded it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the Court in 1810 in 2 Taunt. 388.⁴ That is a practice between bankers for the purpose of clearing. It was judicially recognized by Cockburn C. J. in (1875) 10 Ex. 337¹ at p. 351 in these words:

"A custom has grown up among bankers themselves of marking cheques as good for payment for the purposes of clearance by which they become bound to each other."

This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act. That practice is in Calcutta the subject now of Rule 12 of the new Regulations and Rules of the Calcutta Clearing Banks Association, which are exhibited in the documents of this case. Rule 12 says:

"It shall be permissible for any member or sub-

member in the intervals of clearing hours, to apply for the 'acceptance' of a document by the member or sub-member on which it is drawn, but the latter shall have the option of issuing a debit note or cheque in lieu of 'acceptance' of the document."

It is to be noted that though it uses the term "acceptance" it puts it in inverted commas, so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot however be identified with an acceptance. In the United States, the practice of marking or certifying cheques has been established and defined by the different State Legislatures in the Uniform Negotiable Instruments Acts. It is presumably this law, as enacted in New York State in 1897, to which the Chief Justice refers in his judgment. The same measure, with trifling variations, has since been made law in the other States of the Union. Their Lordships must therefore briefly advert to this law, which gives a statutory recognition to the certification of cheques. Section 187 of the Uniform Act provides that

"where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance."

It does not say that the certification is an acceptance, which is dealt with in a different part of the Act. The whole position is indeed materially different, as is clear from S. 188, which goes on to define the effect of certification in the following terms:

"Where the holder of a check procures it to be accepted or certified the drawer and all endorsers are discharged from liability thereon."

These sections have led to a great deal of judicial discussion in the Courts of the United States, the effect of which is summarised in the standard work of Brannan, Negotiable Instruments Law, Edn. 6, page 1146 *et seq.* These discussions also show that certification and acceptance are different things under the Act. Certification makes the banker the debtor of the holder, and discharges the drawer altogether if the certification is not made by his procurement. Certification adds a new party, the bank, as primary debtor, and necessarily involves readjusting the legal position of the original parties, drawer and payee. A similar rule has been adopted, it seems, by the Courts of Canada on the basis of the custom in Canada judicially recognised by this Board in (1899) A. C. 281.⁵ The custom was stated at page 285 to be that

3. (1908) 1 K. B. 13, *Macbeth v. N. & S. Wales Bank*.

4. (1810) 2 Taunt 388, *Robson v. Bennett*.

5. (1899) 1899 A. C. 281, *Gaden v. Newfoundland Savings Bank*.

"the only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it was drawn."

These last words are not very precise and their exact effect has not been argued in this appeal. It is not here necessary or proper for their Lordships to attempt to follow in detail the Canadian authorities on this topic. Their Lordships have referred to these matters as tending to support the view that certification is different both in its history and its effects from acceptance, even in jurisdictions in which either by statute or by custom it is declared to be "equivalent" to an acceptance. But it is different in England and India, where the marking of a cheque has so far been only judicially recognised to import a promise or undertaking to pay as between banker and banker for the purpose of clearance. In the absence of relevant enactment or custom, the issue in England and India as to the effect of the certification of a cheque must be determined by the common law.

Their Lordships are of opinion that the certification which is relied on as constituting acceptance of the cheque is not an acceptance within the meaning of the English or Indian Act or the common law. It is not necessary categorically to hold that a cheque can never be accepted; it is enough to say that it is only done in very unusual and special circumstances. The authority which has been strongly founded upon by the respondent is a case in (1810) 2 Taunt 388,⁴ where the practice already mentioned of London bankers to mark cheques presented after banking hours by one banker drawn on another in order to show that the drawer had assets and to show that they would be paid next day at the clearing house, came incidentally into question. The real issue was whether the holder had become bound, as between himself and the drawer, to treat the cheque as good payment of the debt for which it had been given; the facts were that the drawee bank had stopped payment the next morning, so that the cheque was not actually paid. The drawer claimed that the holder was bound to treat the cheque as payment because he had been guilty of laches in not presenting the cheque within banking hours on the day on which it was given. In that event the drawee bank, which had not then stopped payment, would have met the cheque because the drawer's account was sufficiently in credit. The Court of Common Pleas rejected this contention, and held that there had been no laches on the part of the holder and that by reason of the practice of bankers the actual presentment which had been made was in good time. Sir James Mansfield C. J. in giving judgment,

used the phrase that "the effect of that marking is similar to the accepting of a bill." That was a mere dictum not necessary, or indeed relevant, to the decision of the case; the banker was not even a party to the action. Having regard to the custom stated by Cockburn C. J. in (1875) 10 Ex. 337¹ quoted above and the whole tenor of English authority, their Lordships are of opinion that the dictum cannot be justified in English or Indian law. In (1868) 8 C. B. N. S. 372,⁶ the question was whether the holder of a cheque could sue the endorser on his endorsement. It was held that he could. No question arose as to the acceptance of a cheque, but Erle C. J., in the course of his judgment, observed :

"A cheque is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker, and though in practice the banker does not accept the draft, he might for aught I know do so."

Further instances of incidental observations to the same effect or similar observations in well known text writers need not be quoted. Their Lordships repeat that no case is reported in England or India so far as they are aware, of a banker being held liable or even sued as acceptor of a cheque drawn upon him. It would certainly require strong and unmistakable words to amount to the acceptance of a cheque. That cannot be predicated of the certification here in question, which cannot, therefore, be regarded as an acceptance unless a custom could be established to treat certifications as acceptances. If the respondent were entitled to claim against the appellant as on an acceptance of the cheque, there would be no defence, unless on the point that the cheque was post-dated. This problem their Lordships will consider later. If that point is for the moment disregarded the respondent's claim may however be put forward in default of it being held that there was an acceptance of the cheque on the ground that there is a custom which makes the appellant liable, or alternatively on the ground that by common law, apart from special custom, the respondent can claim either in contract or on an estoppel upon the actual words used in the certification. The Chief Justice, having held that the certification constituted an acceptance, went on to say that the question of usage accordingly did not arise. He added that

"before agreeing with the learned Judge that a usage such as he mentions had been established, I should require further evidence. . . . I prefer to regard the evidence as showing that banks in Calcutta, which certify and mark cheques, regard the certification or marking as being an acceptance which makes them legally liable to pay the amount thereof and that they honour their obligations."

Their Lordships do not regard these two sentences as necessarily inconsistent. The latter

6. (1868) 8 C. B. N. S. 372, *Keene v. Beard*.

seems to them merely to state that the general habit of business men supports the Chief Justice's decision that in law there was an acceptance. It cannot be intended to substitute a sentiment that banks ought to honour their signature whether in law binding or not, for the correct legal position when a bank feels entitled or bound to rely on the strict letter of the law and the Court is required to decide strictly the legal rights. Their Lordships agreeing with his decision that the evidence of custom is insufficient, as they think it is both in the number and quality of the witnesses and in the certainty and precision of the evidence given, cannot, in view of the decision which he had previously expressed on the issue of custom, treat the sentence as intended to find a legally binding custom. There is indeed in the evidence no instance spoken to of a dispute being settled in favour of the alleged custom; the instances given are comparatively few and from a few banks, and are mainly instances of the limited custom of bankers in the clearance, which is not questioned. In some cases given in evidence the periods between certification and clearance extend over the week-end, and in one instance at least even a few days longer. They can, it seems, be most properly regarded as instances of occasional laxity. But there is nothing to justify the finding of a custom to identify certification with acceptance.

In one essential matter, however, the evidence is not merely too weak to support a custom, but is directly opposed to it. The cheque in question was post-dated. Post-dated cheques are a peculiar species, which have been described as objectionable. The general tenor of the evidence as to them in this case is that it is at the lowest unusual to certify post-dated cheques, indeed that it is almost unknown. Bhagwan Das said that he had never certified a post-dated cheque. As to the actual certification on the particular cheque in question, he said that he took it as a representation that the appellant bank would meet the cheque on a future date, and he said he would feel no difficulty in marking a post-dated cheque, though he did not directly answer the question whether it was usual to do so, but merely said "there is no harm," and later that it was done in rare cases. He also said that this was the only instance in which while at Calcutta he had advanced money on a post-dated cheque. His view of the law was that by marking or certifying the cheque, they became in a way the drawers of it. Another of the respondent's witnesses said that he did not think he had certified a post-dated cheque or accepted (that is taken) a post-dated cheque certified by another bank.

But he expressed his view that if he certified the cheque his bank would be liable. Another witness called by the respondent said that it was not usual to certify a post-dated cheque, though in answer to a leading question on re-examination, he agreed that a bank was bound to pay a certified post-dated cheque. Another of the respondent's witnesses said that he would not discount a certified post-dated cheque; he would feel there was something suspicious in the transaction and would make enquiry. The appellant was content in the main to point out the inadequacy of the respondent's evidence.

In their Lordships' judgment, the evidence of custom fails as the Chief Justice held. As to the alternative claim in contract or on an estoppel, that claim in their judgment also fails. The certification must for this purpose be construed according to the proper meaning of the words used in their setting and independently of the doctrine of negotiability, which is the creation of legislation or established usage. If legislation or usage is ruled out, as in this case it must be, the question is whether the words read in their context, that is, as appearing on a cheque, import a promise by the certifying bank to pay the amount of the cheque whether or not there are funds to meet it, and if they do, whether there is any privity of contract between the respondent and the appellant, and if there is whether there is consideration for the promise as between these parties. If the certification on the cheque had been negotiable, as an acceptance in the proper sense would have been, the respondent bank would *prima facie* have been entitled to claim as a holder in due course, having given value to its immediate transferor, and would not be concerned with the state of accounts or the equities between the appellant bank and Ghose or Mitter, to one or both of whom the certification was issued. But this is not the case unless the certification amounted not merely to a promise but a negotiable promise by the appellant. The respondent bank must show privity of contract between itself and the appellant bank whereas there was privity of contract only as between the appellant bank and either Ghose or Mitter or perhaps both. The respondent bank claims as a holder in due course, and must so claim. If it claimed as assignee or agent for collection, it would have no better title than its assignor or principal. But in addition there clearly was no consideration passing to the appellant from the respondent. There was thus no enforceable contract, even if the certification could be construed according to its terms as a contract to pay. Their Lordships doubt whether,

on this ground, no custom being established, the words of the certification could be so construed. They might be construed as words of representation, as to the genuineness of the cheque and of the signature. If the cheque had not been post-dated, the certification might also be held to include a representation as to the then sufficiency of the drawer's account. But as the cheque was not due for payment until seven days later, a representation as to the then position would not go very far. If it was to be construed as a representation that on the due date there would be funds available, it necessarily amounted to a promise and the want of consideration would be fatal to its enforceability. The promise, if any, was a non-negotiable gratuitous promise given either to Ghose or Mitter or to both to lend the money when the 20th came. Their Lordships adopt the language of Buckley J., used in a different context in (1902) 1 Ch. 889⁷ at p. 896 :

"No right had been acquired by the drawer but an expectation only. Even if the manager did not change his mind, still any agreement to lend is not enforceable and no right of property had passed to the drawee."

What was in question there was a *donatio mortis causa* of a cheque which the manager of the bank had said would be met. But the principle stated has an application to the certification here. What was said could have been revoked or dis-owned. It was not binding; there was no appropriation of funds or declaration of trust involved in the certification, because there were in fact no funds available on the 13th or indeed the 20th. Nor could the certification be construed as an estoppel on which the respondent could claim on the doctrine of (1837) 6 Ad. & El. 469⁸ and (1854) 5 H. L. C. 185,⁹ because that doctrine is limited to a representation as to an existing fact, whereas not only were no funds available, but what is called the representation related to the future. Even if funds had been available and had been "frozen," the bank would be entitled to release them before the 20th, in the absence of a binding promise to maintain them. It was only to the position in the future when the time for payment arrived that the certification had reference, and whatever language was used, it necessarily amounted if it was to be effective, to a promise or nothing. From the point of view of a Court of law, a gentlemen's agreement or honourable obligation, however important in business, has no validity.

But behind all these considerations lies the circumstance that the cheque was post-dated.

The question of certifying a post-dated cheque has been adjudicated upon in the United States. It has there been held there is no authority implied by law for an officer of a bank to certify a cheque until on or after the date when it is made payable and that anyone taking a post-dated cheque before the day of its date is put upon enquiry. As to this reference may be made to Brannan *op. cit.* p. 1152. There do not seem to be any English cases on the point, presumably because the practice of certifying cheques is not judicially or legislatively established in England and the same is true of India. It was however held in (1867) 2 Ex. 163,¹⁰ that a partner had no authority to bind his firm who were solicitors by a post-dated cheque any more than he had authority to bind the firm by a bill of exchange. No doubt the reason for denying ostensible authority is in some aspects different in the one case from that in the other. But in each case it depends on the nature and normal exigencies of the business, and a banker's business does not normally involve that a manager's authority should extend to certifying and still less making a loan against a post-dated cheque. The Chief Justice deals shortly with the difficulty by holding that the post-dated cheque was in law a bill of exchange at seven days' date, which on 20th June became a bill of exchange payable on demand and therefore a cheque. But the material date in this context is that of the certification, issued when the bill or cheque was not due. A post-dated bill is under the English Act, s. 13 (2), not invalid by reason only that it is post-dated. There is no similar provision in the Indian Act, but the same result would, it seems, follow from the common law and the position of a post-dated cheque is recognised in the Indian Stamp Act. But the material invalidity is that of the certification, taken in connexion with the fact that the cheque was post-dated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due *in presenti*, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due. The position might be different in jurisdictions where, by law or custom, certification is equivalent to acceptance, but nothing of the sort is applicable here. Even in such cases the difficulty of

7. (1902) 1 Ch. 889, *In re Beaumont*.

8. (1837) 6 Ad. & El. 469, *Pickard v. Sears*.

9. (1854) 5 H. L. C. 185, *Jorden v. Money*.

10. (1867) 2 Ex. 163, *Forster v. Mackreth*.

saying that there was constructive payment would remain. It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of post-dated cheques and that in the present case the manager had no actual authority to do so. The bank accordingly was not bound. This in itself would be a sufficient ground for rejecting the respondent's claim.

Their Lordships are not unconscious that bankers regard their word as their bond, and honour their signature even though they might have an answer in law. This is especially true as between banker and banker. Bankers would say that the bank making the mistake or whatever it was should stand by its act. But in circumstances such as those of the present case, the mistake in certifying the cheque would have done no harm, if it had not been for the act of the other banker in discounting it, though the defect was apparent on its face. A lawyer would be disposed to hold that the responsibility lay with the latter bank. In any case the Court is here called upon to decide how the law at present stands. It is not the arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business. The high standards of bankers are too firmly established to be shaken. On the whole case their Lordships are of opinion that the action of the respondent should fail. They think that the appeal should succeed and the judgment for the respondent should be set aside, and the action dismissed with the costs in the Courts below and of the appeal. They will humbly so advise His Majesty.

R.K. *Appeal allowed.*
Solicitors for Appellant — *Sanderson Lee & Co.*
Solicitors for Respondents — *Douglas Grant & Dold.*

A. I. R. (31) 1944 Privy Council 65

(From Bombay)

22nd May 1944

LORD MACMILLAN, LORD CLAUSON AND
SIR GEORGE RANKIN

Bai Shevantibai — Appellant

v.

*Janardhan Raghunath Warick and
others — Respondents.*

Privy Council Appeal No. 28 of 1943.

(a) Civil P. C. (1908), S. 110, First and Second Paras—Partition suit—Appeal to Privy Council—Valuation for — Value of share claimed and not of whole property is to be considered : 10 C. W. N. 564 and ('33) 20 A. I. R. 1933 All. 177, *impliedly Overruled.*

1944 K/9 & 10

The plaintiff as assignee of the purchaser from a member of a Hindu joint family of one sixth share in the joint family property sued for partition of the family property and to have his one sixth share allotted to him. The value of the interest which the plaintiff claimed was well under Rs. 10,000, probably about Rs. 3000. The total value of the joint family property exceeded Rs. 10,000. The trial Court dismissed the suit as barred by limitation. The plaintiff appealed to the High Court but the appeal was dismissed. The plaintiff then applied to the High Court for leave to appeal to His Majesty in Council but the application was dismissed on the ground that the share of the plaintiff in the property of which he sought partition being less in value than Rs. 10,000 the subject-matter of the appeal was below the minimum value required by S. 110. Before the Privy Council the plaintiff based the contention that the High Court had wrongly refused to grant a certificate on the second clause in S. 110, and argued that the decree in the case involved directly or indirectly a question respecting the whole of the joint family property, admittedly of a value exceeding Rs. 10,000 :

Held that the High Court was correct in holding that the value of the subject-matter in dispute on appeal to His Majesty in Council must be taken to be the value of the share of the joint family property in respect of which the plaintiff was claiming. The question as to the title of the plaintiff to the share which he claimed in the joint property did not become a question respecting the whole of the joint family estate merely because if his title was established it would result in the joint family estate being partitioned. 6 Bom. L. R. 403; ('20) 7 A.I.R. 1920 Bom. 418 and ('25) 12 A. I. R. 1925 Bom. 137, *Approved*; 10 C. W. N. 564 and ('33) 20 A.I.R. 1933 All. 177, *impliedly Overruled.* [P 66 C 2]

(b) Practice—Privy Council—Special leave to appeal granted with liberty to respondent to contend that such leave ought not to have been granted—At hearing of appeal respondent's contention allowed — Appeal held should be dismissed—Petition to rescind leave to appeal held not necessary.

The appellant's application under S. 110, Civil P. C., for leave to appeal to His Majesty in Council having been dismissed by the High Court the appellant petitioned His Majesty in Council for special leave to appeal and leave was so granted but upon the terms that liberty should be reserved to the respondents to contend that such leave to appeal ought not in the circumstances of the case to have been granted. Upon the appeal coming before their Lordships, the respondents, in exercise of the liberty so reserved, contended, by way of preliminary point, that leave to appeal ought not in the circumstances of the case to have been granted and this contention was upheld by their Lordships :

Held that as the contention of the respondents, by way of a preliminary point, that leave to appeal ought not in the circumstances to have been granted was well-founded the appeal could be dismissed forthwith without any petition to rescind the leave to appeal : ('30) 17 A.I.R. 1930 P. C. 196 and ('31) 18 A.I.R. 1931 P. C. 22, *Rel. on.* [P 67 C 1]

Sir T. Strangman and A. G. P. Pullan —
for Appellant.

C. S. Rewcastle and S. P. Khambatta —
for Respondents 8 and 9.

Lord Clauson. — In the suit which gives rise to the present appeal the appellant as assignee of the purchaser from a member of a joint family of one sixth share in the joint

family property, sued for partition of the family property and to have her one sixth share allotted to her. She also sought, as assignee of a mortgage on another sixth share, to have her mortgage enforced; but this part of the suit resulted in a decree in the present appellant's favour for a trifling sum and the only question raised in regard to this part of the case relates to a question of costs. The question remaining in controversy is whether the appellant's claim is barred by the law of limitation. The value of the interest which the appellant claims is well under Rs. 10,000, probably about Rs. 3000. The total value of the joint family property exceeds Rs. 10,000. There is no controversy as to the identity or extent of the family property, or as to the right of partition to which the appellant would be entitled if the law of limitation were not a bar to her claim. In the Court of first instance, the claim was held to be barred by the law of limitation and the suit, so far as it related to the claim for partition, was dismissed. On appeal to the appellate Court, that Court dismissed the appeal as well on the question of the present appellant's claim to partition, as also on the question of costs. The appellant in due course applied to the appellate Court for the usual certificate for leave to appeal to His Majesty in Council. The power of the appellate Court to grant the necessary certificate turned upon the true construction, in its application to the present case, of S. 110, Civil P. C., which is as follows:—

"110. In each of the cases mentioned in cls. (a) and (b) of S. 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be that sum or upwards.

"or the decree or final order must involve directly or indirectly some claim or question to or respecting property of like amount or value

"and when the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

The appellate Court took the view that there was no question in this case of such a character as to make it a fit case for the grant of a certificate under S. 109 (c), and dismissed the application on the ground that, the share of the appellant in the property of which she sought partition being less in value than Rs. 10,000, the subject-matter of the appeal was below the minimum value required by S. 110. The present appellant thereupon petitioned His Majesty in Council for special leave to appeal and leave was so granted but upon the terms that liberty should be reserved to the respondents to contend that such leave to appeal ought not in the circumstances of

the case to have been granted. Upon the appeal coming before their Lordships, the respondents, in exercise of the liberty so reserved, contended, by way of preliminary point, that leave to appeal ought not in the circumstances of the case to have been granted. They contended that the High Court had correctly taken as the "value of the subject-matter in dispute on appeal" the value of the interest claimed by appellant. They pointed out that this view of the matter accorded with that taken by the Bombay High Court in 6 Bom. L. R. 403,¹ followed by the same High Court in 44 Bom. 104² and in 49 Bom. 149.³ The appellant based the contention that the High Court had wrongly refused to grant a certificate on the second clause in S. 110, and argued that the decree in the present case involved directly or indirectly a question respecting the whole of the joint family property, admittedly of a value exceeding Rupees 10,000. They referred to the decision of the Calcutta High Court in 10 C. W. N. 564⁴ and to the decision of the Allahabad High Court in 54 ALL. 858.⁵

Their Lordships are satisfied that the appellate Court were correct in holding that the value of the subject-matter in dispute on appeal to His Majesty in Council must be taken to be the value of the share of the joint family property in respect of which the appellant is claiming, and indeed this view was not disputed before their Lordships' Board. A further question, however, remains namely whether the decree refusing partition on the ground that the claim is barred by the law of limitation "involves directly or indirectly some claim or question to or respecting" the joint family property as a whole. Their Lordships do not find it necessary to decide whether the words of clause (2) in S. 110 can on their true construction ever refer to any property but that outside the suit. It is enough for the purposes of the present case to say that their Lordships feel no doubt that, a question as to the title of the plaintiff to the share which he claims in the joint property does not become a question respecting the whole of the joint family estate merely because if his title is established it will result in the joint family estate being partitioned. Their Lordships are thus of opinion that the High Court were right in refusing to grant the certificate, and

1. ('04) 6 Bom. L. R. 403, *De Silva v. De Silva*.

2. ('20) 7 A.I.R. 1920 Bom. 418 : 44 Bom. 104, *Raoji Bhikaji v. Laxmibai*.

3. ('25) 12 A.I.R. 1925 Bom. 137 : 49 Bom. 149, *Nariman Rustomji Mehta v. Hasham Ismayal*.

4. ('06) 10 C. W. N. 564, *Lala Bhugwat Sahay v. Rai Pashupati Nath Bose*.

5. ('33) 20 A.I.R. 1933 All. 177 : 54 All. 858, *Muhammad Asghar v. Abida Begum*.

that accordingly the appellant was not justified in asking this Board for special leave to appeal. The contention which the respondents were by the Order in Council of the 7th March 1940, given liberty to bring forward thus succeeds. In accordance with their Lordships' practice in analogous cases: (see 57 I.A. 186⁶ and 57 I. A. 279⁷) no petition to rescind the leave to appeal will be required. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will be ordered to pay the costs of respondents 8 and 9, who alone appeared.

G.N. *Appeal dismissed.*
Solicitors for Appellant — T. L. Wilson & Co.
Solicitors for Respondents 8 and 9 —
Hy. S. L. Polak & Co.

6. ('30) 17 A.I.R. 1930 P. C. 196 : 57 I. A. 186,
Zahid Husain v. Mohammad Ismail.
7. ('31) 18 A.I.R. 1931 P. C. 22 : 57 I. A. 279,
Mukhlal Singh v. Kishuni Singh.

A. I. R. (31) 1944 Privy Council 67

(From Calcutta)

6th March 1944

VISCOUNT MAUGHAM, LORD MACMILLAN
AND LORD WRIGHT.

Sopher and another — Appellants
v.

Administrator-General of Bengal and
another — Respondents.

Privy Council Appeal No. 19 of 1943.

(a) Succession Act (1925), S. 113—Scope of —
Bequest to unborn person — Possibility of interest of beneficiary being defeated by contingency or defeasance clause — Later bequest held does not comprise whole of remaining interest.

Section 113 must be read and construed in connexion with the illustrations to be found in the Act :
(16) 3 A.I.R. 1916 P. C. 242, *Ref.* [P 69 C 1]

A "later" bequest must comprise all the testator's remaining interest, if the legatee under it is not in existence at the testator's death. Further gifts, however complete in their operation, do not save "the bequest". Partial intestacy under the will as a whole is not the point. The question is whether "the later bequest" is a complete disposition of the testator's interest. If under a bequest in the circumstances mentioned in S. 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed within S. 113: ('23) 10 A.I.R. 1923 P. C. 122, *Rel. on.* [P 69 C 2; P 70 C 1]

The clause in the will related to the surplus income during the widow's life-time. The interest of a grandchild in that income during the period until the death of the widow was contingent on his surviving his parent. The language showed that no grandchild was to receive any income unless and until he survived his father. Further, if no child or grandchild survived the widow there was to be an intestacy as regards the surplus income :

Held that the "thing bequeathed" in the circumstances was the residuary estate of the testator. The clause related only to the income of the fund until the death of the widow. All the bequests or dispositions after the death of the widow would therefore be rendered void by S. 113. [P 70 C 2]

(b) Succession Act (1925), S. 120, Exception—
Interest in corpus given to unborn grandchildren on their attaining 18 and on their surviving their father — Exception does not apply.

The exception to S. 120 applies only to the case where a fund is given to any person "on his attaining a particular age". It has no relation to any other contingency, e.g., to his surviving a named person. In that case the legacy bequeathed does not vest until the legatee survives the named person. Where on the words of the will the children of either son of the testator are not given any interest in the corpus merely on attaining the age of 18 but they also have to survive their father, it is true that if a son dies leaving no children who survive him his share is the subject of a gift over to the other son if he survives the son who has so died, but plainly there may be an incomplete disposition of the subject of the bequest if both sons die without issue or if one son dies without leaving issue and the other son is then dead. The gifts of corpus to grandchildren are subject to the double contingency and the exception does not apply. [P 70 C 2]

R. S. Roxburgh and W. W. K. Page—
for Appellants.
Sir T. Strangman and C. Eagram —
for Respondents.

Viscount Maugham. — The questions raised in this appeal relate to the construction of the will of Edward Abraham Sopher, a resident in Calcutta, domiciled in British India, who had carried on the business of a stock and exchange broker in that country. His will was dated 16th April 1926. He died on 24th February 1939, leaving him surviving a widow, respondent 2, and two sons, the appellants. The sons were of age at the date of his death but unmarried. On 1st May 1939, probate of the will was granted to respondent 1, the sole executor and trustee of the will. By his will the testator, after certain bequests of the goodwill of his business and of other property not material to the present appeal, proceeded to dispose of his residuary estate by some very elaborate and somewhat confusing clauses. After the usual trusts for conversion, the trustee was directed to stand possessed of the residuary estate upon trust out of the income to pay the testator's widow a monthly sum of Rs. 1500 for her own use and benefit during the term of her natural life. As to the balance of the income the trustee was directed to hold and stand possessed of the same :

"Upon trust during the life-time of my said wife to pay the balance of the net income thereof (after payment of the said monthly allowance of Rupees One thousand and five hundred to my said wife) to my children; if more than one in shares such that each male child shall take double the share of each female child, and if there shall be only one such child the whole of such balance of income shall be paid to such one child. And if any child of me shall die in my life-time or in the life-time of my said wife leaving children

or a child him or her surviving the share of the said balance of income which would have been payable to the child so dying had he or she been living, shall during the life-time of my said wife be paid to his or her children, if more than one, in shares such that each male child take double the share of each female child and, if there shall be only one such child the whole of such share of the said balance of income shall be paid to such one child. And if any child of me shall die in the life-time of my said wife without leaving any children or child him or her surviving the share of the said balance of income which would have been payable to the child so dying had he or she been living shall during the life-time of my said wife be paid to such of my children as shall survive the child so dying and the child or children of such of my children as shall have predeceased the child so dying in shares such that males shall in all cases take double the shares of females and the child or children of any such predeceased child shall take only the share his her or their deceased parent would have taken, if living and, if there shall be only one child or one grandchild of me who shall be entitled to the benefit of this provision then the whole of such balance of income shall during the life-time of my said wife be paid to such one child or grandchild as the case may be."

The testator has been dealing in this clause with an annuity to the widow and the surplus income which will remain after its payment until her death. The testator proceeded to deal with corpus as follows:

"I further declare and it is my express desire that the corpus of my residuary estate shall not be divided until the death of my said wife and I will and direct that upon her death my Trustee shall hold and stand possessed of my residuary estate corpus as well as income upon trust to divide the corpus thereof into as many parts or shares as there shall be children of me living at my death or who shall die in my life-time leaving children or a child living at my death and designate the said several shares by the name of the said several children respectively each share designated by the name of a male child, to be double of each share designated by the name of a female child, and if there shall be only one such child then to designate the whole of the said corpus by the name of such one child and to hold and stand possessed of the several shares or the whole of the said corpus, as the case may be, designated by the names or name of any children or child of me who shall be living at my death and shall also survive my said wife upon trust to pay the net income thereof to the respective children or child by whose names or name the same shall be so designated for and during the term of their respective lives and after the death of each such child to hold and stand possessed of the share or the whole of the corpus as the case may be designated by the name of such child upon trust to pay the income thereof, to his or her children until they shall respectively attain the age of 18 years and on their respectively attaining that age upon trust as to the corpus as well as the income thereof for such children absolutely in shares such that each male child shall take double the share of each female child, and if there shall be only one such child then in trust as to the whole for such one child absolutely and if any child of me shall die without leaving any children or child him or her surviving then I will and direct that the share designated by the name of the child so dying shall after the death of such child be held by my Trustee as to the corpus as well as the income thereof upon trust for such of my children as shall survive the child so dying and the child or children of such of my children as shall have predeceased the child so

dying absolutely in shares such that males shall in all cases take double the shares of females, and the child or children of any such predeceased child shall take only the share which his, her or their deceased parent would have taken if living and if there shall be only one child or grandchild of me who shall be entitled to the benefit of this provision then as to the whole, in trust for such one child or grandchild as the case may be absolutely."

The will then continues as follows:

"And as to the shares or the whole of the said corpus as the case may be designated by the names or name of any children or child of me who shall die in my life-time leaving children or child living at my death or who shall survive me and shall die in the life-time of my said wife I will and direct that my trustee shall hold and stand possessed of the same upon the same or the like trusts as are hereinbefore declared concerning the shares or the whole of the said corpus as the case may be designated by the names or name of children or a child of me who shall be living at my death and shall also survive my said wife and expressed and intended to take effect after the death of such last mentioned children or child. I further will and direct if and so long as any child of me shall be under the age of 18 years then and in every such case my trustee shall out of the income payable to such child during the life-time of my said wife pay to my said wife the sum of Rs. 500 per month for the maintenance and education of my same child and after the death of my said wife my trustee shall out of the income payable to any such child pay to his or her guardian or guardians the sum of Rs. 500 per month until he or she shall attain the age of 18 years for the maintenance and education of such child and in every case my trustee shall upon any child of me attaining the age of 18 years pay to such child all and any balance of accumulation of income that there might be in his hands payable to such child. And as regards my grandchildren so long as any grandchild of me entitled to any income under this my will shall be under the age of 18 years it shall be lawful for my trustee to pay the whole or any part of such income to the guardian or guardians of such grandchild for his or her maintenance and education I declare that my trustee shall not be bound to see to the application of any moneys which he shall pay for the maintenance and education of my children or grandchildren or any of them under the provisions hereinbefore contained nor shall he be liable for any misapplication thereof."

Two sections of the Indian Succession Act, 1925, on which the case mainly depends, must now be stated.

"113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations

(i) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has had no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(iii) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. A has no daughters living at

the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv) *A* bequeaths a sum of money to *B* for life, and directs that upon the death of *B* the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. *B* has no daughters living at the time of the testator's death. In this case the only bequest to the daughters of *B* is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of *B* is void."

Illustration 2 is omitted as not being material.

"120 (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception — Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary to be applied for his benefit, the bequest of the fund is not contingent."

Two questions were raised by the Originating Summons issued by the appellants.

"(a) Whether the dispositions in regard to the residuary estate made by the said will are void save and except the life interests given thereby to the plaintiffs and the defendant Susan Sopher.

(b) Whether subject to the life interests given in the residuary estate to the plaintiffs and the defendant Susan Sopher the said plaintiffs and the defendant Susan Sopher have succeeded to the residuary estate of the testator as on an intestacy."

Section 113 of the Act raises or may raise questions of very great difficulty, and their Lordships do not propose to attempt to express their views on questions of construction which are not relevant to the present appeal, and on which they have not the advantage of knowing the opinions of the learned Indian Judges. It may be observed that in the present case the attention of the Judges was not called to some of the points arising on the section which were argued on this appeal, and if the Board differs from the judgments under discussion the circumstance may well be due to that fact. The section must, of course, be read and construed in connexion with the illustrations to be found in the Act (*see* 43 I.A. 256,¹ at p. 263); and these must now be considered.

1. (16) 3 A. I. R. 1916 P. C. 242 : 43 I. A. 256, *Mahomed Syedol Ariffin v. Yeohooi Gark*.

ed. Illustration 1 to the section shows that a bequest by a testator to his children for their respective lives and after their deaths to their children respectively, unborn at the testator's death, is void; for it is not a bequest of the whole interest that remains in the testator, since it is not certain that there will be any grandchildren. A bequest to a son for life and after his death to his children who shall survive him must be bad for the same reason, since there may be no such children. Illustrations 2 and 3 would seem to show — what is not very clear from the language of the section — that however complete may be the dispositions of the will, the gift after the prior bequest may not be a life-interest to an unborn person, for that would be a bequest to a person not in existence at the time of the testator's death of something less than the remaining interest of the testator. How far this rule applies it is not necessary to determine in the present case; but the two illustrations show the strict sense in which the Legislature has used the words 'a bequest is made, etc., subject to a prior bequest.' It may be that a particular bequest must comprise all the testator's remaining interest, if the legatee under it is not in existence at the testator's death; and it is clear that in cases like those two illustrations further gifts, however complete in their operation, do not save "the bequest." Partial intestacy under the will as a whole is not the point. The question is whether "the later bequest" (whatever that means in a particular case) is a complete disposition of the testator's interest.

The construction of S. 113 of the Act does not appear to have been much considered in reported cases, and the diligence of counsel has only resulted in the Board being referred to a single case which will now be referred to. The case is that of *Putlibai v. Naoroji*, and it is reported in 28 C. W. N. 737² after it had come to this Board on appeal. It was decided in 1923 and related to ss. 99, 100, 101 and 102, Succession Act (10 of 1865) then in force. Section 100 is reproduced in the modern Indian Succession Act as S. 113. The case is valuable as deciding that in interpreting wills with reference to ss. 113, 114 and 115 of the present Act, which are applicable to several different systems of jurisprudence, it is necessary to bear in mind that the words used must be understood with reference to the current meaning of the words apart from such technical considerations as are only appropriate in English law. Their Lordships propose in accordance with this view to construe the words of S. 113 in the light, so far as that may be proper, of the various sections contained in

2. (23) 10 A.I.R. 1923 P.C. 122 : 28 C.W.N. 737.

Chap. 7 of the Act relating to "void bequests" (where S. 113 is found) according to their natural meaning without regard to the numerous decisions of the Courts in this country. Section 113, it will be noted, relates to cases where two factors exist, first, that the bequest is made to a person not in existence at the time of the testator's death (e.g., to unborn persons at that date), and secondly, that there is a prior bequest contained in the will. The case cited referred to the very elaborate will of a Parsi. Clause 11 of the will gave interests for life to his five sons and provided that if a son died the persons presumptively entitled to the corpus of the estate were to have the income till the death of the last survivor of the five sons. Clause 12 contains special powers of appointment which were given to each son. Clause 13 provided for the event of default of the exercise of the powers of appointment and contained a gift to sons of each son or his issue as therein mentioned. There were also two clauses, 15 and 16, which provided for the forfeiture of the interests of the unborn beneficiaries in certain contingencies. It was decided in the High Court of Judicature at Bombay that the limitations to take effect under cls. 11, 12 and 13 after the death of each son were all void under S. 100, as the bequests did not comprise the whole of the testator's interest in the thing bequeathed. The Court took the same view as to the result of cl. 16. The Board did not consider it desirable to decide all the points raised in the Court of appeal, but they did affirm the decision of the Court as to cls. 11, 12, 13 and 16 of the will. In effect the Board thought it sufficient to decide that the bequests to the sons, daughters, widows and issue were void because they did not in all possible instances dispose of the subject-matter to which they apply. The bequests failed to comprise the whole of the testator's remaining interest, because "there were contingent rights which might well prove to be of value". It is at least consistent with that decision to hold (as was argued in that case) that if under a bequest in the circumstances mentioned in S. 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed. That is the conclusion at which their Lordships have arrived on the words of the section read in conjunction with the other sections relating to void gifts.

If we now turn to the clause in the will relating to the surplus income during the widows's lifetime, their Lordships are of opinion that the interest of a grandchild in that income during the period until the death of the widow is contingent on his surviving his parent. The language shows clearly that no grandchild is to receive any income unless and until he survives his father. Further, if no child or grandchild survives the widow there will be an intestacy as regards the surplus income. It seems to their Lordships that the "thing bequeathed" in the circumstances of this case is the residuary estate of the testator, and none the less that the clause above dealt with relates only to the income of that fund until the death of the widow. The three illustrations to S. 113 above set out support that view. If this be correct, all the bequests or dispositions after the death of the widow would appear to be rendered void by the section.

It was, however, also argued that the gifts to the grandchildren of shares in the corpus are contingent on their respectively attaining the age of 18 and also on their surviving their respective fathers. If correct, this would be a further ground for holding that S. 113 applied. The suggested answer to this contention was based on S. 120 of the Act, or, to be more precise, on the "exception" contained in that section, which must now be considered. It must be observed that the exception applies only to the case where a fund is given to any person "on his attaining a particular age". It has no relation to any other contingency, e.g., to his surviving a named person. In that case the legacy bequeathed does not vest until the legatee survives the named person (see S. 120 (1)). What then happens if the legacy is given subject to a double contingency, e.g., that the legatee must survive a named person and must also attain a particular age? In the present case that is the position, for on the words of the will the children of either son of the testator are not given any interest in the corpus merely on attaining the age of 18, they also have to survive their father. It is true that if a son dies leaving no children who survive him his share is the subject of a gift over to the other son if he survives the son who has so died; but plainly there may be an incomplete disposition of the subject of the bequest if both sons die without issue or if one son dies without leaving issue and the other son is then dead. The material point is that the gifts of corpus to grandchildren are subject to the double contingency unless the exception to S. 120 applies and makes them vested.

Their Lordships are of opinion that the

exception does not apply because it cannot be said that the fund or any part of it is given to any grandchild "upon his attaining the age of 18". He may attain that age and yet will get no interest in the corpus if he predeceases his father. The gifts of corpus to the grandchildren are therefore contingent, and on the view expressed above as to the true construction of S. 113, it must follow that the bequests to them are void, since these bequests do not comprise all the interest of the testator. Their Lordships must observe that this point on S. 120 does not appear to have been argued before the Indian Courts. In the result, and on the grounds stated, the decrees of the Courts below should be set aside except as to costs and the two questions raised in the case must be answered in the affirmative. In the circumstances the costs of all parties as between solicitor and client should be paid out of the estate. Their Lordships will humbly advise His Majesty accordingly.

R.K. *Decree set aside.*

Solicitors for Appellants — *Giles & Hunter.*

Solicitors for Respondents — *Morgan Price Marley & Rugg.*

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(*From Madras: ('41) 28 A. I. R. 1941 Mad. 641*)

30th March 1944

LORD MACMILLAN, LORD CLAUSON
AND SIR GEORGE RANKIN

*Madras and Southern Mahratta Ry. Co.
Ltd. — Appellants*

v.

Bezwada Municipality — Respondents.

Privy Council Appeals Nos. 7 and 8 of 1943.

(a) Interpretation of statutes — Proviso — Function and effect of.

The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms. [P 73 C 1]

(b) Madras District Municipalities Act (5 of 1920), S. 82 (2) Proviso — Scope and effect of — Vacant lands belonging to railway company — Adoption of percentage of capital value of lands as method of ascertaining their annual value for imposing property tax is valid.

The proviso to S. 82 (2) does not say that the method of arriving at annual value by taking a percentage of capital value is to be utilized only in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular subjects to which the proviso relates. [P 72 C 2; P 73 C 1]

Hence a Municipal Council is not precluded by the proviso to S. 82 (2) from adopting a percentage of the capital value of the vacant lands of a railway company lying within the municipal limits as a method of ascertaining their annual value for the purpose of the imposition of property tax merely by reason of the fact that this method which is one of the recognized methods of ascertaining the annual rent likely to be paid by a hypothetical tenant referred to in the substantive part of S. 82 (2) is specifically enjoined in the particular instances mentioned in the proviso and that the said railway lands are not included in those instances. [P 73 C 1]

J. Millard Tucker and R. K. Handoo —

for Appellants.

Craig Henderson and S. P. Khambatta —

for Respondents.

Lord Macmillan. — The appellants, the Madras and Southern Mahratta Railway Company, Limited, own certain vacant lands within the municipality of Bezwada. These lands are admittedly subject to the property tax which the respondents, the Bezwada Municipality, are empowered to levy. The question for decision in these consolidated appeals is whether the respondents acted within their statutory powers in ascertaining the annual value of the lands for the purpose of imposing the tax. The method which the respondents adopted in order to arrive at the annual value of the lands was first to ascertain their capital value, which they did by reckoning them at so much per square yard, and they then took 6 per cent. of the capital value as representing the annual value. On the annual value so calculated they imposed property tax at the rate of 16½ per cent. per annum. The appellants under protest paid the assessments made upon them in each of the four financial years ending on 31st March in 1932, 1933, 1934 and 1935. They now seek to have these payments refunded as having been illegally exacted. In this they have been unsuccessful in both the Courts in India.

Many points were raised and many topics were discussed in the course of the proceedings in India, but before their Lordships the appellants both in their printed case and in their arguments at the bar concentrated upon one main ground of attack, namely, that on a sound construction of the respondents' statutory powers the method adopted by the respondents of fixing the annual value of the lands in question was not permissible. If they failed to make good this point the appellants did not contend that they could otherwise succeed. The taxing powers of the respondents are conferred upon them by the Madras District Municipalities Act, 1920, as amended by subsequent legislation. Their Lordships take the Act as it stood at the relevant period. By S. 78 every Municipal Council is empowered to levy inter alia a property tax and any resolution of a Municipal Council determining

to levy a tax is required to specify the rate at which and the date from which it shall be levied. Sections 81 and 82 deal with the levying and assessment of property tax and the argument turned upon the interpretation of these sections. So far as material to the present question they read as follows :

Section 81.—(1) If the Council by a resolution determines that a property tax shall be levied, such tax shall be levied on all buildings and lands within municipal limits save those exempted by or under this Act or any other law. The property tax may comprise —

- (a) a tax for general purposes;
- (b) a water and drainage tax.

* * * *

(2) Save as otherwise provided in this Act, these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the Municipal Council, subject to the provisions of section 78.

(3) The Municipal Council may, in the case of lands which are not used exclusively for agricultural purposes and are not occupied by, or adjacent and appurtenant to, buildings, levy these taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands, as it may fix :

Provided that such percentages or rates shall not exceed the maxima, if any, fixed by the Local Government and that the capital value of such lands shall be determined in such manner as may be prescribed.

(4) (a) The Municipal Council may, in the case of lands used exclusively for agricultural purposes, levy these taxes at such proportions as it may fix of the annual value of such lands as calculated in accordance with the provisions of S. 79, Madras Local Boards Act, 1920.

* * * *

Section 82.—(1) Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises.

(2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less a deduction, *in the case of buildings only*, of ten per centum of such annual rent and the said deduction shall be in lieu of all allowance for repairs or on any other account whatever :

Provided that —

(a) in the case of —

- (i) *any Government or railway building or*
- (ii) any building of a class not ordinarily let the gross annual rent of which cannot, in the opinion of the executive authority, be estimated, the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building after deducting for depreciation a reasonable amount which shall in no case be less than ten per centum of such cost :"

* * * *

By a resolution dated 29th January 1932 the respondents resolved to levy property tax within their municipality at certain specified rates. The terms of this resolution give rise to some questions but the assessment on the appellants was not challenged by them before

their Lordships on the ground that there had been no effective resolution to levy property tax. It will be observed that under S. 81 (2) the property tax, save as otherwise provided in the Act, is to be levied at a percentage of "the annual value of lands or buildings or both." Sub-section (3) otherwise provides inasmuch as it permits, but does not enjoin, the levying of the tax "in the case of lands which are not used exclusively for agricultural purposes and are not occupied by or adjacent and appurtenant to buildings" either at a percentage of the capital value of such lands or at such rates with reference to the extent of such lands as the Municipal Council may fix, subject to compliance with the proviso to the sub-section. If either of the alternative methods permitted by sub-s. (3) is adopted the assessment is not on annual value. Appropriate as this sub-section was to the case of the appellants' lands the respondents did not in fact avail themselves of it in making the assessment complained of. In particular, they did not levy the tax at a percentage of the capital value of the appellants' lands; they levied it at a percentage on their annual value.

Section 82 (2) prescribes how the annual value of lands and buildings is to be ascertained. It is to be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year, less 10 per cent. in the case of buildings. The spectre of the hypothetical tenant, so familiar an apparition in English rating law, is here invoked. The appellants did not dispute that, if this sub-section had not had a proviso appended to it, it would have been open to the respondents to resort to any of the recognized methods of arriving at the rent which a hypothetical tenant might reasonably be expected to pay for the lands in question, including the method of taking a percentage of their capital value. But the proviso, they say, makes all the difference. It expressly enjoins resort to this last-mentioned method of arriving at annual value in the case of two specified classes of buildings. Therefore, they say, resort to this method is by necessary implication prohibited in every other case, and in particular in the case of their lands. The respondents contest this reading and maintain that the proviso does not impliedly prohibit resort to capital value as a means of getting at annual value in every case not covered by the proviso, and that the chief purpose of the proviso is to be found in the limitation to 6 per cent. which it contains. Their Lordships cannot accept the appellants' argument which in their opinion involves a misinterpretation of the effect of the proviso. The proviso does not say that the method of

arriving at annual value by taking a percentage of capital value is to be utilised only in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular subjects to which the proviso relates. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.

It follows that in their Lordships' opinion the respondents were not precluded from adopting a percentage of the capital value of the appellants' lands as a method of ascertaining their annual value for the purpose of the imposition of property tax merely by reason of the fact that this method is specifically enjoined in the particular instances mentioned in the proviso and that their lands are not included in these instances. This is sufficient for the disposal of the case as presented before their Lordships. Before taking leave of it, however, they think it right to advert to certain matters which were incidentally brought to their notice. The resolution already referred to by which the respondents resolved to levy property tax consists of two paragraphs. The first imposes property tax in general under S. 81 at a percentage of annual value for each component of the tax; the second imposes what it calls "land tax," presumably a species of property tax (1) on agricultural lands at 6 per cent. per half year and (2) "on other lands which fall under the category specified in S. 81 (3) at $\frac{1}{2}$ per cent. of the capital value per half year." From this it would appear that the respondents were originally minded to exercise the option conferred upon them by S. 81 (3) and to assess lands such as those of the appellants not on annual value but on capital value. The Local Self-Government Department, however, took exception to this part of the resolution on the ground that the proviso to S. 81 (3) required capital value to be "determined in such manner as may be prescribed," that "prescribed" by S. 3 (19) meant "prescribed by the Local Government by rules made under this Act;" that no such rules had been made; and that consequently the portion of the resolution in question was unwarranted and could not receive effect. Before their Lordships the appellants supported this view. The respondents on the other hand maintained that if no rules were made they were nevertheless entitled to avail

themselves of the capital method of valuation under S. 81 (3) unfettered as to the manner in which they might determine capital value. In this they have the support of the judgment of the High Court. It seems that rules have now been made but railway lands are expressly excluded from their operation.

The respondents do not appear to have rescinded the part of their resolution alleged by the Department to be incompetent or to have passed any amending resolution. So far as the appellants' lands are concerned they seem simply to have ignored it, and to have invoked instead S. 82 (2). They submitted an argument to the effect that the resolution did no more than fix the rates of the tax to be levied but did not commit the respondents to assessing any particular class of subjects in any particular way. The appellants not unnaturally do not seem to have objected to a departure from the capital value method under S. 81 (3) for 1 per cent. per annum on capital value is more than $16\frac{1}{2}$ per cent. on annual value calculated at 6 per cent. on capital value. It is manifest that these topics are eminently debatable. As however, the respondents did not in point of fact proceed under S. 81 (3); as the appellants, so far from saying that they should have done so, maintained that the respondents could not lawfully have done so; and as the controversy before their Lordships was confined to the mode of ascertaining annual value under S. 82 (2), their Lordships while mentioning those other topics do not feel called upon to make any pronouncement upon them and confine themselves to the matter which alone was directly raised before them and on which they have already expressed an opinion adverse to the appellants. There having in their Lordships' view been compliance in substance and effect with the provisions of the Act, within the meaning of S. 354 (2), the appellants cannot recover the assessments which they have paid. Their Lordships will accordingly humbly advise His Majesty that the consolidated appeals be dismissed. The appellants will pay the respondents' costs of the appeals.

G.N.

Appeals dismissed.

Solicitors for Appellants—*Solicitor, India Office.*
Solicitors for Respondents—*Harold Shephard.*

A. I. R. (31) 1944 Privy Council 73

(From Lahore)

26th January 1944

LORDS MACMILLAN, WRIGHT, PORTER
AND CLAUSON AND SIR GEORGE RANKIN
Parbhu — Appellant

v.

Emperor.

Privy Council Appeal No. 27 of 1943.

(a) Criminal trial — Jurisdiction — Native of foreign state committing offence within British Indian Court's jurisdiction — Accused arrested in foreign state by British Indian Police and subsequently extradited and surrendered by foreign state to British Indian Court having jurisdiction and tried and convicted by that Court—Validity of trial and conviction held not affected by any irregularity in arrest.

The accused who was not a British subject but a native of the Jind State in which he resided committed an offence within the jurisdiction of a British Indian Court. He was arrested in the State of Jind by the British Indian Police and was subsequently extradited and handed over to the British Indian authorities by the Jind State. The accused was brought to trial before and convicted by the British Indian Court within whose jurisdiction he had committed the offence. The contention of the accused was that his arrest having been effected in the Jind territory by a British Indian Officer was illegal and that the illegality of his arrest vitiated the whole subsequent proceedings :

Held that when the accused was presented for trial before the British Indian Court he had been validly surrendered to that Court by the Jind authorities and therefore the proceedings before that Court were regular and in order and the validity of the trial and conviction of the accused could not be affected by any irregularity in his arrest : (1829) 9 B. & C. 446 and 35 Bom. 225, *Approved*; 24 I. A. 137 (P. C.), *Expl.*
[P 74 C 2 ; P 75 C 1]

(b) Deed — Construction — Notification—Dots below entry in notification if mean "do" or "ditto".

In this case two dots given below the entry in the schedule annexed to a Notification were held to be typographically equivalent to "do" or "ditto".

[P 75 C 2]

S. P. Khambatta — for Appellant.

G. D. Roberts, W. Wallach and B. Mackenna —
for the Crown.

Lord Macmillan.—At the conclusion of the arguments in this case on 26th January 1944, their Lordships announced that they would humbly advise His Majesty that the appeal be dismissed. They now state their reasons for this advice. On 15th August, 1942, the Sessions Judge of Rohtak in British India found the appellant guilty on a charge of murdering his uncle Nanhu. The appellant was sentenced to death and on appeal to the High Court of Lahore the conviction and the sentence were confirmed. On a petition to His Majesty in Council special leave to appeal in forma pauperis was granted to the appellant. The validity of the conviction was challenged before their Lordships on two grounds, viz., (1) that the appellant had been illegally arrested; and (2) that the Court which tried him had no jurisdiction to do so.

1. For the appreciation of this point a short narrative of the facts is necessary. The appellant is not a British subject, but is a native of the State of Jind in which he resided. The murder with which he was charged was committed in a train while it was running between two stations on the Southern Punjab Railway

within the State of Jind. By an agreement entered into between the British Government and the State of Jind in 1900 the Rajah ceded to the British Government

"full and exclusive power and jurisdiction of every kind over the lands in the said State which are or may hereafter be occupied by the Southern Punjab Railway . . . and over all persons and things whatsoever within the said lands" (*Aitchisons's "Treaties,"* Edn. 5 Vol. I. 282, No. 51).

The body of the deceased was discovered on 15th October 1941, in a train at Kinana station in Jind State by a constable of the British Indian Railway Police. At Jind, the next station, he reported his discovery to a Sub-Inspector of the British Indian Railway Police. The latter undertook the investigation of the matter and prepared a first information report. The body was taken next day to Rohtak within British India for post mortem examination. On 18th October the Sub-Inspector arrested the appellant at a place in the State of Jind outside the railway. He produced the appellant on the same day before the District Magistrate of Jind who remanded the appellant to the custody of the police of the State of Jind, by whom the appellant was temporarily transferred to the British Indian Railway Police for investigation. On the following day a Sub-Inspector of the Jind Police joined the investigation. On 22nd October the Sub-Inspector of the Railway Police conveyed the appellant to Rohtak. A confession by the appellant was recorded by the Magistrate there who thereafter remanded the appellant to the judicial lock-up. On 14th January 1942, the appellant, described as now confined in the judicial lock-up, Jind, was formally extradited and sanction given by the Nizamath Jind for him to be handed over to the authorities of Rohtak District. This was duly effected and the appellant was brought to trial and convicted at Rohtak as already stated.

The contention of the appellant was that his arrest, having been effected in Jind territory by a British Indian officer, was illegal and that the illegality of his arrest vitiated the whole subsequent proceedings. Their Lordships reject this contention. They assume that the arrest was open to objection as an infringement of the sovereignty of Jind, although the Jind authorities, so far from resenting what had been done or regarding their rights as having been flouted, co-operated most readily with the British Indian police in bringing the appellant to justice. There was no suggestion of anything like kidnapping. In their Lordships' view, the validity of the trial and conviction of the appellant was not affected by any irregularity in his arrest. When the appellant was presented for trial at Rohtak he had been validly surrendered to the Court

there by the Jind authorities and so far as that Court was concerned everything was regular and in order. In (1829) 9 B. & C. 446,¹ the accused, a British subject charged with a crime committed in this country, had absconded to Belgium and was arrested there by a British police officer and brought back to England. On objection being taken at the trial to the validity of the arrest, Lord Tenterden C. J. said at p. 448 :

"The question therefore is this, whether if a person charged with a crime is found in this country it is the duty of the Court to take care that such a party shall be amenable to justice or whether we are to consider the circumstances under which she was brought here. I thought, I still continue to think, that we cannot inquire into them."

In 35 Bom. 225,² the illegality of the arrest of the accused was pleaded and was held to be irrelevant. Scott, C. J., quoted from the charge to the jury of Lord Cockburn C. J., in a case of *The Queen v. Nelson and Brand* in which this passage occurs :

"Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not an Extradition Treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay hands upon him and from which he could easily reach the sea, got him on board a ship and brought him to England, and the man were to be taken in the first instance before a Magistrate, the Magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice and that by some illegal means he had been brought back. It would be said 'Nay, you are here; you are charged with having committed a crime and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him.' " (See "Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court in the case of *The Queen v. Nelson and Brand*." Edited by Frederick Cockburn, London : William Ridgway, 1867: Pages 118-9.)

The appellant can derive no assistance from the case in 24 I. A. 137.³ In that case the arrest in Hyderabad State by a British Railway constable of a British subject charged with bribery committed at Simla in British India was held to be illegal. The only question at issue was whether the arrest was lawful or not and Lord Chancellor Halsbury in delivering the judgment of their Lordships expressly stated that they had not anything to do with the consequences of the arrest being lawful or otherwise. In the course of the argument the Lord Chancellor incidentally observed, as appears from a record in the possession of the India Office :

1. (1829) 9 B. & C. 446, Ex parte Susannah Scott.

2. (11) 35 Bom. 225, Emperor v. Vinayak Damodar Savarkar.

3. (97) 24 I. A. 137 (P. C.), Muhammad Yusuf-ud-din v. Queen-Empress.

"It may well be that the procedure taken was irregular and improper and brought a person wrongfully within the jurisdiction, but if he is there and if he has committed an offence, whatever else may be said about it, it is no answer to the offence committed within the jurisdiction that he has been brought irregularly within the jurisdiction. That has been decided more than once in our Courts. There was a case where a man was tried for murder in which it was clear that he was not properly arrested in the jurisdiction where he was found, but nevertheless he was tried, convicted and executed."

The appellant therefore fails on his first point.

2. The second point may be said to be typographical rather than legal. In the Gazette of India of 5th July 1924, there appeared a Notification by the Governor-General in Council that, for the purposes of criminal jurisdiction, within the lands occupied by the railways specified in column 1 of an annexed schedule and lying within the States specified in col. 2 the Court mentioned in col. 3 should exercise the powers of a District Magistrate. The following is an extract from the schedule as it appeared in the Gazette :

6. Southern Punjab Railway.	..	
<i>Main Line.</i>		
Gaddarbaha-Budhlada	Patiala	The Deputy Commissioner Ferozepur.
Budhlada-Jind frontier near Uchana	Patiala	The Deputy Commissioner Rohtak.
Jind frontier near Uchana-Karainthi.	Jind

The portion of the Southern Punjab Railway with which this case is concerned is that described in col. 1 as "Jind frontier near Uchana—Karainthi;" in col. 2 it is shown as lying within the State of Jind; in col. 3, where the appropriate Court should be entered, there are two dots. The appellant says that these dots are meaningless and that the Governor-General in Council has failed to indicate any Court by which cases from this portion of the railway should be heard. Their Lordships have no hesitation in rejecting this contention. It is in their opinion quite clear that the two dots are typographically equivalent to "do" or "ditto", and that the words "the Deputy Commissioner Rohtak" are thereby made applicable to the portion of the railway in question, with the consequence that the Court at Rohtak had jurisdiction to try the appellant. Their Lordships so read the Notification as printed in the Gazette irrespective of certain domestic documents produced on behalf of the respondent in support of this reading which, to say the least of it, are of dubious evidential

value or admissibility. The appellant having thus failed, for the reasons indicated, to make good either of his two points, their Lordships advised His Majesty that the appeal be dismissed.

G.N.

Appeal dismissed.

Solicitors for Appellant — *Hy. S. L. Polak & Co.*

Solicitors for the Crown —

Solicitor, India Office.

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(*From Bombay : ('42) 29 A. I. R.*

1942 Bombay 239)

30th March 1944

LORD MACMILLAN, LORD WRIGHT AND
LORD JUSTICE DU PARCQ

Shree Meenakshi Mills, Ltd. — Appellant
v.

Patel Brothers — Respondents.

Privy Council Appeal No. 14 of 1943.

(a) Arbitration — Reference to corporate body
— Whether all members must act together
(*Quære*).

Whether the principle that in the case of a reference to two or more named arbitrators, all the arbitrators must act together, can properly be applied when the reference is not to individuals but to a body, such as a committee or a board whose corporate powers are regulated by its constitution.

[P 77 C 1]

(b) Arbitration—Appeal from award provided
— Proceedings in appeal declared nullity — Original award is not merged in appellate award.

When the rules governing an arbitration provide for an appeal from the first award, the result of declaring the proceedings by way of an appeal to be a nullity must be to leave the parties in the position which they occupied immediately before those abortive proceedings were begun. The notice of appeal is still effective and the original award stands until such time as it may be replaced by an effective decision of the appellate body. The original award is not “merged” in the decision of the board on appeal when it is established that the proceedings before the Board are to be regarded as a nullity.

[P 77 C 2]

Hon. Charles Romer and R. K. Handoo —

for Appellant.

Sir H. Cunliffe, S. P. Khambatta and K. I.

Mohiuddin — for Respondents.

Lord Justice Du Parcq. — In September 1940, a dispute arose between the parties to this appeal as a result of transactions in which they had been engaged in the cotton markets of Bombay, Liverpool and New York. An agreement between the parties provided for arbitration under the by-laws of the East India Cotton Association, Ltd. Two arbitrators were appointed in accordance with those by-laws, and there is now no dispute about the validity of their appointment. On 19th March 1941, the arbitrators made an award whereby they awarded to the respondents the sum of Rs. 34,508-6-5 with interest. The appellants were dissatisfied with this award. The by-laws of the East India Cotton Association

gave them a right of appeal to the Board of the Association “within 10 days from the date of publication of the award,” and they gave a proper notice of appeal within the prescribed period. The by-laws define “the Board” as meaning “the Board of Directors” of the Association “acting through at least a quorum of their number at a meeting of that Board duly called and constituted.” The articles of association provide that six shall form a quorum. Nine members of the Board were convened to hear the appeal. During the argument of counsel for the appellants one of the nine went away and did not return. His departure and his absence appear to have escaped the notice of counsel. The appeal was fully heard by the remaining eight members, who, by a majority, decided that the sum awarded to the respondents should be reduced to Rs. 12,508-6-5. This decision was published on 21st June 1941. It was signed by the chairman and the secretary, who had been authorised to sign it on the Board’s behalf. On 11th July 1941, the award of 19th March 1941, and the decision on appeal were filed in the office of the Prothonotary of the High Court, who gave notice of such filing to the appellants on 18th July 1941.

The appellants thereupon petitioned the High Court of Bombay, praying “that the alleged awards dated 19th March 1941 and 21st June 1941, be declared to be invalid and set aside and taken off the file of the records of this Honourable Court.” The petition was heard by Chagla J. The learned Judge was of opinion that when once the Board had been constituted for the purpose of hearing the appeal, the nine members who had been convened were to be regarded as joint arbitrators. Taking that view he held that the appellants were entitled to an adjudication by all nine arbitrators acting together, and that the decision of 21st June 1941, which purported to be the decision of the Board, was invalid. The learned Judge expressed the opinion that all the members of the Board who adjudicated should have signed the award but if it had been necessary to decide the point he would have considered that this was an irregularity which could be cured, and would have remitted the award to them for their signatures. The conclusion at which the Judge arrived was that “the award must be set aside.” As he had made no finding adverse to the validity of the award of the arbitrators, dated 19th March 1941, this mode of expression might have left it uncertain whether he intended to do more than set aside the decision on appeal, but the formal order of the Court put the matter beyond doubt, stating as it did in terms that both the decision of

Board and the award of the arbitrators were to be set aside and taken off the file of the Court.

The respondents then in their turn appealed to the High Court in its appellate jurisdiction, contending that the decision of the Board was valid and regular, and that the order of Chagla J., was wrong. The appeal was heard by Sir John Beaumont C. J., and Somjee J. The Court affirmed the decision of Chagla J., on the main issue. They held that in the circumstances the decision of the Board was a nullity, and must be set aside. They further held, however, that there was no ground for setting aside the award of the arbitrators. The learned Chief Justice, in whose judgment, Somjee J., concurred, expressed the opinion that "the so-called appeal" was "not really an appeal but a continuation of the arbitration" so that one award had been made "on two different dates, and in two different parts, by two different sets of arbitrators." The position thus was that one part of the award had been validly made, but the other part had so far not been made. "If that is so" said the learned Chief Justice, "I think we can remit that portion of the award" (*viz.*, the decision of the Board) "under S. 16, Arbitration Act, and in my view that is really the only course which is open to this Court." The Court accordingly made a declaration that the appeal against the original award had never been heard by a properly constituted Board, and ordered that the order of the Board should be set aside, and that the notice of appeal should be "remitted back" to the Board "to be dealt with in accordance with law." Against this order the present appeal is brought. The appellants naturally do not question the correctness of so much of the decision of the High Court as declared that the proceedings before the Board of Directors were a nullity, and since there was no cross-appeal, their Lordships are not called upon to express any opinion upon that part of the decision, and must not be understood to express either approval or disapproval of it. Should the same question arise for decision hereafter, it will be necessary to consider whether the well-established principle that, in the case of a reference to two or more named arbitrators, all the arbitrators must act together, can properly be applied when the reference is not to individuals but to a body, such as a committee or a board, whose corporate powers are regulated by its constitution. It is perhaps desirable to add that their Lordships must not be taken to assent to the opinion expressed obiter by Chagla J., that an award made by the Board ought to be signed by all the members of the Board

who have adjudicated. Their Lordships do not desire to express any opinion on that point.

For the purposes of this appeal their Lordships must assume, without deciding, that the proceedings before the Board of Directors were a nullity. On that view there can be no doubt, and it was not disputed, that the declaration to that effect was properly made. The objection taken by the appellants to the order of the High Court was two-fold. In the first place, it was said that the power of the Court to remit an award depended on statute and that S. 16, Arbitration Act, 1940, under which the Court purported to act, gave no power to remit the award, or the notice of appeal, in the circumstances of this case. Secondly, the appellants submitted that the original award of the arbitrators and the decision of the Board on appeal must be regarded as together constituting one indivisible award, and that it was impossible to set aside a part of that indivisible entity without setting aside the whole.

It is convenient to deal first with the second of these submissions. No authority could be cited to support it, and in their Lordships' view it is not sound in principle. When the rules governing an arbitration provide for an appeal from the first award, the result of declaring the proceedings by way of an appeal to be a nullity must be to leave the parties in the position which they occupied immediately before those abortive proceedings were begun. The notice of appeal is still effective and the original award stands until such time as it may be replaced by an effective decision of the appellate body. It was suggested on behalf of the appellants that the original award was "merged" in the decision of the Board on appeal. This figure of speech may be justified when the Board has come to a valid and effective decision. Such a decision is substituted for the original award. The original award then ceases to have any further force or effect, and may be said without impropriety to be "merged" in the final decision. But when once it is established that the proceedings before the Board are to be regarded as a nullity, there can be no question of any such merger. Their Lordships are therefore clearly of opinion that the appellants were at no time entitled to have the original award set aside.

With regard to the appellants' first submission, their Lordships are of opinion that, although the order under appeal was in substance correct, it could not properly be founded on S. 16, Arbitration Act 1940. It appears to their Lordships, with great respect to the learned Chief Justice, that this section

has no relevance to the peculiar circumstances of the present case. The section specifies three sorts of defect which may necessitate reconsideration of an award, and empowers the Court to remit the defective award in the cases specified (and in no others) to the arbitrator or umpire, and to fix the time within which the arbitrator or umpire is to submit his decision to the Court. When what purports to be the decision of arbitrators is a nullity, there is no power to remit it. Nor is there need for any such power, since there is nothing to remit, and since it necessarily follows from the fact that the decision is annulled that the parties are entitled to a new and effective hearing and determination.

It is apparent therefore that no injustice has been done to the appellants and that the order appealed from is in substance perfectly correct. The order which was drawn up made no express reference to S. 16, Arbitration Act, and can hardly be said to be erroneous even in form. It speaks of "remitting back" the notice of appeal to the Board of Directors "to be dealt with according to law." This amounts to no more than a direction to the Board that the parties are entitled to have the appeal heard. It was suggested by counsel for the appellants that the order was mandatory in form and might be read as compelling the parties to proceed with the appeal even though neither of them were willing to do so. In their Lordships' opinion the inclusion in the order of the words "to be dealt with in accordance with law" precludes such a construction of the order. The law gives the parties a right to an adjudication by the Board of Directors. If neither of them wishes to exercise the right the law will not compel them to exercise it. It follows that no complaint of substance can be made against the order appealed from. Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants should be ordered to pay to the respondents their costs of the appeal.

R.K. *Appeal dismissed.*

Solicitors for Appellant — *Barrow Rogers & Nevill.*

Solicitors for Respondents — *T. L. Wilson & Co.*

A. I. R. (31) 1944 Privy Council 78

(*From Madras : ('41) 28 A.I.R.*

1941 Mad. 154)

28th March 1944

VISCOUNT MAUGHAM, LORD MACMILLAN
AND LORD WRIGHT.

Chambers — Appellant

v.

Chambers and others — Respondents.

Privy Council Appeal No. 2 of 1943.

Trusts Act (1882), Ss. 5, 6 and 8 — Trust — Essentials of—Sole proprietor of company opening separate account in name of wife in company's books and placing large amounts to her credit—Interest paid to wife on aforesaid amounts described as "deposits" or "unsecured loans" in company's books but as gift in letter to wife from company — No trust held was constituted in favour of wife.

G the sole proprietor of a company got certain entries made in the company's account books crediting his wife with certain sums after debiting them to his capital account. A separate account was thus opened in the wife's name. Further sums were credited to the wife's account as "transfer" from G's "capital account." In the balance sheets of the company the sums at the credit of the wife were entered at first as "deposits" and subsequently as "unsecured loans". Interest was paid to the wife on the amounts standing to her credit which amounted to two lakhs. In the letter written by the company on G's instructions to his wife the two lakhs placed to her credit were described as entirely in the nature of a personal gift from G. On her death in 1924 the wife left a will in which she referred to the two lakhs "deposited" on her behalf with the company as belonging to her. No interest was credited to her account after about November 1924 on the objection of a bank to which the business was largely indebted. In 1930 accounts were opened in the names of the beneficiaries under her will showing them as creditors in respect of shares in the amount which had stood to her credit at her death as apportioned by her will. In December 1932 G caused the amounts which had been proportionately credited to the beneficiaries under the will of his wife to be re-transferred to his own capital account in the company's books, and all the credit accounts were cancelled and closed. The question was whether a trust in favour of the wife had been effectually constituted :

Held that there was no trust at all in favour of the wife because (1) there was no ascertained and appropriated trust fund as the amount of two lakhs was never set apart and appropriated by G as a fund transferable to his wife of which he was to be a trustee and the entire business including the amount of two lakhs remained entirely under the unfettered control of G. A sum of money measured by the proportion of two lakhs to the total capital left after the creditors were satisfied could not be regarded as a subject-matter of the trust; (2) there was no declaration of a trust as required by law. G never indicated with reasonable certainty by any words or acts an intention on his part to create a trust. His acts were throughout inconsistent with any such intention.

[P 80 C 1,2]

H. Wynn-Parry and C. D. Myles —

for Appellant.

Sir T. Strangman and L. M. Jopling —

for Respondents.

Lord Macmillan. — The late George Alexander Chambers of Madras, being minded to make provisions for his wife and children and other relations, and being also animated with the less laudable desire to prevent the Government of India, as he put it, from "grabbing death duties" on the whole of his estate, took certain steps which he conceived would achieve these objects. The present proceedings are concerned with the question of the legal effect of these steps. Mr. Chambers carried on business as a leather merchant in Madras under the style of The Chrome

Leather Company. The business belonged to and was conducted by himself alone and the company name was no more than an alias for himself, but for the object he had in view he purported to treat the company as if it had an independent being. At the time of the transactions about to be narrated, Mr. Chambers's family consisted of his wife Ethel Mary Chambers, a son who is the present appellant, and two daughters, Phyllis Dora Chambers (Mrs. Michell) and Sheila Florence Chambers. His wife died in 1924. He married a second wife who died in 1927 leaving an infant son, who is respondent 4. In 1930 he married respondent 1 as his third wife. Respondents 1, 2 and 3 are the trustees and executors of Mr. Chambers, who died on 16th November 1937, and respondent 1 is also the guardian of her infant step-son respondent 4. The appellant is the sole trustee and executor of his mother, the first wife of Mr. Chambers, hereinafter called "Mrs. Chambers."

In the year 1917 Mr. Chambers caused entries to be made in the books of the Chrome Leather Company crediting Mrs. Chambers, his children by her, and certain other relatives with various sums of money and debiting his capital account in the company's books with these sums. Separate accounts were opened in the respective names showing the sums so credited. In particular in the case of Mrs. Chambers a separate account was opened in the company's books in May 1917, showing two sums of Rs. 15,000 and Rs. 30,000 credited to her in that month. A further sum of rupees 1,55,000 was credited to her account on 1st April 1919, as a "transfer" from Mr. Chambers' "capital account."

In the balance-sheets of the company the sums at the credit of Mrs. Chambers were entered at first as "deposits" and subsequently as "unsecured loans."

On the death of Mrs. Chambers in 1924, she left a will in which she referred to the two lakhs "deposited" on her behalf with the company as belonging to her. No interest was credited to her account after about November 1924, when the National Bank of India Ltd., to which the business was largely indebted, objected. In 1930 accounts were opened in the names of the beneficiaries under the will of Mrs. Chambers, showing them as creditors in respect of shares in the amount which had stood to her credit at her death as apportioned by her will. Letters waiving payment of interest were signed by the beneficiaries under the will of Mrs. Chambers in 1931 in order to satisfy the company's auditors. In December 1932, Mr. Chambers caused the two lakhs which had been proportionately credited to the beneficiaries under the will of

Mrs. Chambers as well as all the other similar credits in favour of his children and relations to be re-transferred to his own capital account in the company's books, and all the credit accounts were cancelled and closed. Mr. Chambers appears to have taken this action in consequence of advice received by him from a lawyer brother in Canada to the effect that none of the parties to whom he had caused sums to be credited in the company's books had any legal claim thereto, in consequence of the absence of any consideration. On 12th November 1932 he had written to the company's auditors a letter containing the following passage :

"Certain transfers from my capital in our books were made of my own free will and I have no intention of cancelling same, but I have never received any 'loans,' and there was never any consideration either given or accepted, and as regards payment of interest I am under no obligation to anyone."

On the appellant being apprised of what Mr. Chambers had done he at once protested against his action as an unwarranted repudiation of the liability he had undertaken to Mrs. Chambers. If Mr. Chambers had constituted himself a trustee, his action was plainly a fundamental breach of trust. The present proceedings were initiated in 1939 by the appellant who, as the executor of the will of his mother Mrs. Chambers, took out an originating summons in the High Court at Madras. The main question formulated for decision was whether on the facts and circumstances there was a valid and completed gift of the sum of two lakhs of rupees to Mrs. Chambers by Mr. Chambers or, in the alternative, a valid declaration of trust in respect of two lakhs in her favour. Both the Courts in India held that the legal requirements of a gift had not been satisfied and the appellant has not pursued this point on appeal to His Majesty. Gentle J. however, in the Court of first instance, was of opinion that a valid trust in favour of Mrs. Chambers had been created and he so decided. On an Original Side Appeal the contrary was held by Sir Lionel Leach C. J., and Horwill J.

The only question argued before their Lordships was whether a trust in favour of Mrs. Chambers had been effectually constituted. On this question their Lordships heard a persuasive argument by Mr. Wynn Parry but in their opinion the contention is untenable in law. In India the law of trusts is codified in the Trusts Act (2 of 1882) and when the provisions of that Act are consulted the appellant's case is found to break down at the very threshold. If there is one thing clear it is that there can be no trust unless its subject-matter is clearly ascertainable. Section 8 of the statute declares that "the subject-matter of a trust

must be property transferable to the beneficiary." What then was the subject-matter of this alleged trust? Gentle J. seems to have been of opinion that it was a fund of two lakhs of rupees. But that was not so. No such sum was ever set aside and appropriated by Mr. Chambers as a fund transferable to Mrs. Chambers of which he was to be a trustee with all the consequential obligations of such a position. At the most it was an attempt to give Mrs. Chambers an interest in the capital of his business to be measured on the basis of her having contributed two lakhs. The entire business, including the share in it which he had purported to credit to Mrs. Chambers, remained entirely under the unfettered control of Mr. Chambers. There was never any trust estate which the Courts could administer.

Sensible of this difficulty, counsel for the appellant did not attempt to support the view of Gentle J. as to the subject-matter of the trust. He sought to define it as a sum of money to be paid out of the business (at an uncertain date) after the creditors were satisfied, to be measured by the proportion which two lakhs should bear to the total capital left. This, if anything, has a resemblance to partnership rather than trust. Such a subject-matter in their Lordships' opinion does not answer the requirements of Indian trust law, and immediately raises other and inextricable difficulties both of form and of substance. Thus, so far as the surplus assets of the business, if any, should consist of immoveable property, the provisions prescribed by S. 5 of the Act requiring a registered instrument in writing would require to have been observed and they have not been. There being no ascertained and appropriated trust fund the case for the constitution of a trust necessarily fails. But there are other insurmountable obstacles in the appellant's way, which are fully discussed by the learned Chief Justice in the light of the authorities on the subject. The requisites for the constitution of a valid trust are prescribed by Ss. 5 and 6, Trusts Act. These read as follows :

"5. No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or trustee and registered, or by the will of the author of the trust or of the trustee.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

6. Subject to the provisions of S. 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property, and (unless the trust is declared by will, or the author of the trust is himself to be the trustee) transfers the trust property to the trustee."

There are difficulties, which it is unneces-

sary for their Lordships to discuss, as regards the interpretation and precise relation of these two sections, but it is plain that on any view there has not in the present case been compliance with the statute. There is no non-testamentary instrument in writing signed by the author of the trust or the trustee declaring the trust. The letter of 6th August 1919 which Gentle J. held to amount to a declaration of trust expressly states the contrary. The two lakhs placed to the credit of Mrs. Chambers are therein described as "entirely in the nature of a personal gift from Mr. Chambers" to her. Mr. Chambers never indicated with reasonable certainty by any words or acts an intention on his part thereby to create a trust. His acts were throughout inconsistent with any such intention. As to the trust property, it has already been pointed out by their Lordships that there was no such ascertainment and appropriation as the law requires. Their Lordships in reaching their conclusion adverse to the appellant have proceeded upon the terms of the Trusts Act, but the general principles of trust law applicable to the case, as the learned Chief Justice points out are the same in India as in England, and the English authorities which he cites fully justify the view taken by him and his colleague. In the present case there was nothing tantamount to a declaration of trust at all and there was never any absolute parting by Mr. Chambers with the alleged subject-matter of the trust. The appeal accordingly fails and their Lordships will humbly advise His Majesty that it be dismissed and that the judgment of the High Court of 20th August 1940 be affirmed. The appellant will pay the respondents' costs of the appeal.

G.N.

Appeal dismissed.

Solicitors for Appellant—*Burton Yeates & Hart.*

Solicitors for Respondents—*Sanderson Lee & Co.*

A. I. R. (31) 1944 Privy Council 80

(From Madras)

24th April 1944

LORD RUSSELL OF KILLOWEN, LORD
JUSTICE GODDARD AND SIR
MADHAVAN NAIR

Andiappan Ambalam and others—

Appellants

v.

V. E. Meyyappan Servai and others —
Respondents.

Privy Council Appeal No. 16 of 1941.

Deed — Construction — Lease — What land was included in lease— Whole document must be considered and not merely "description of property."— Simultaneous lease to another by same grantor if may be considered.

In construing a lease deed for the purpose of finding out what land was included in the lease the whole document must be considered and not merely the so-called "description of the property" at the end thereof. When another lessee under a simultaneous lease from the same grantor claims the disputed land as included in his lease it would be proper to take into consideration the simultaneous lease as well.

[P 82 C 2]

Sir H. Cunliffe and J. M. Parikh —
for Appellants.

C. S. Rewcastle and W. Wallach —
for Respondents.

Lord Russell of Killowen.—The contest on this appeal lies between the respective successors in title to two lessees to each of whom a lease was granted by the same grantors on 24th January 1908. The dispute concerns 2 plots of land, the question being whether they were leased by the lease to the appellants' predecessors in title (which will be referred to as the appellants' lease) or by the lease to the respondents' predecessors in title (which will be referred to as the respondents' lease). If they are not included in the respondents' lease, they are without doubt included in the appellants' lease.

Before considering the two documents it is necessary to state some preliminary facts.

The land in both leases is land in the Sivaganga Zamindari. The zamindar at the date of the leases was a minor, and his estate was under the management of the Madras Court of Wards. Zamindari was in lease to lessees.

In or about the year 1894, the ryots of Karaikudi village sought to evict certain persons who had trespassed on and occupied part of the waste lands of the zamindari. The ryots alleged that the land so occupied formed part of their village, which had been leased to them by the zamindari. The ryots and the occupants purported to compromise this dispute on terms whereby the former took the melvaram right and the latter the kudi-varam right. The zamindari, however, claimed that the land in question was part of Sekkalkottai village, and in the year 1901 filed a suit (No. 68 of 1901) in the Court of the Subordinate Judge of Madura East against the ryots and occupants, claiming to recover possession of the land in question. The land was described in the plaint thus :

"In Sekkalakottai village, Eluvankottai taluk, Tiruppattur sub-district, Madura district, west of north to south channel running to Karaikudi-Kalukatti urani; and Kottaiyur cart-track and waste land, north of the said channel and of Sekkalakottai boundary limits, east of the old boundary limits and demarcation boundary stones of Karaikudi, Kalanivasal, Sekkalakottai villages and of the Karaikudi Kanmoi (tank) channel, and south of the said channel Sekkalakottai waste lands lying within these places of about 13-4-2 Kurukkams."

Apparently it was found that this descrip-

tion did not clearly identify what was the land claimed in the suit, or state its boundaries with sufficient clarity. Accordingly a commissioner was appointed by the Court, who surveyed the locality in dispute. From the report (dated 17th November 1902) which he made to the Court, it is obvious that he had been accompanied on his survey by the parties, and had listened to their respective contentions. In the result he prepared a plan (F) upon which he showed the land which was in dispute in the suit coloured red. To quote from his Report—"The disputed locality in this suit is the portion marked red in the plan." The land in suit, with its boundaries, was thus definitely identified and delineated.

Judgment in the suit was not delivered until 22nd December 1908. In his long and careful judgment the Judge referred to the commissioner's plan as showing the land in suit marked red, and came to the conclusion that it formed part of the village of Sekkalkottai and not of Karaikudi. He gave a decree in favour of the plaintiffs 1 to 4 (i.e. the zamindari)

"declaring that the plaint land (marked red in the commissioner's plan Exhibit XI which will be attached to the decree) belongs to them."

He added that plaintiff 5 would remain on the record for the purpose of continuing the suit under S. 372, Civil P. C. Plaintiff 5 was one Karuthan, who was added as a plaintiff in the suit on 4th April 1908. The reason for his joinder, and his remaining on the record must now be explained.

During the pendency of the suit, the leases in question in this appeal had been executed and registered. One of them was granted to Suppaya Servai the predecessor in title of the appellants, the other was granted to the respondents' predecessor in title, Karuthan. It is round this latter document that the present dispute centres, viz., whether it comprises more than, or only the land coloured red on the commissioner's plan. The appellants contend that it comprises only the land coloured red, while the respondents claim that in addition to the land coloured red, two plots (which the trial Judge referred to in his judgment as plots I and II) were included in it. On either view Karuthan would be a person interested in the success of the plaintiffs in the suit and he was joined as a co-plaintiff accordingly.

To complete the history of the matter, when the Sivaganga Zamindari was surveyed in the year 1926, the Appellate Survey Officer decided that the two plots in question were included in the respondents' lease. On 3rd February 1930 the appellants instituted a suit

in the Court of the Subordinate Judge at Devaikottai, against the successors in title to Karuthan claiming to set aside the decision aforesaid. The relevant issue in that suit was framed in the following terms:— "Whether the suit plots form part of the cowle in favour of Suppaya Servai as alleged in the plaint." The Subordinate Judge decided in favour of the plaintiffs, and set aside the decision of the Appellate Survey Officer. On appeal the High Court at Madras set aside the decree of the Subordinate Judge and dismissed the suit. Hence the present appeal.

Their Lordships now proceed to consider the terms of these two contemporaneous leases, for it is upon a determination of their true construction that the result of this appeal must depend.

The appellants' lease comprises about 470 kurukkams (to quote clause 1 of the document) "set out hereunder as item 1 and mentioned in the plan annexed hereto." In the description of the property set out thereunder, it is stated to be east of the south to north channel flowing to Karaikudi Kellukatti Urani, of the Kottaiyur cart-track, and "of the land granted to . . . Karuthan . . . and forming the subject-matter of the suit in O. S. No. 68 of 1901 on the file of the Sub-Court of East Madura." The plan annexed is the Ex. G, and in it (as the trial Judge observes) the red-marked plot is identical with the red-marked plot on the commissioner's plan F. On the red-marked plot in Ex. G are the words and figures following:— "The Suit Land in O. S. No. $\frac{68}{1}$ E. S. C. Plot No. 1 = about KKMS — 13.4.2. Granted to Karuthan Ambalam."

The respondents' lease needs to be stated in greater detail. The grantors are called the transferors and Karuthan is called the transferee. The first clause grants permanent cowle transferring all the right of the zamin in "the land at Sekkalakottai village . . . within the four boundaries mentioned hereunder." By cl. 3 the transferee pays a premium of Rs. 3000, and the clause proceeds as follows:

"And further the transferee is bound to pay permanently annas 6 per kurukkam from the fasli when the said land comes into the possession of the transferee, the same forming the subject-matter in dispute in O. S. No. 68 of 1901 on the file of the Sub-Court of East Madura."

Clauses 7, 8, 9 and 10 must be set out in full. They run thus:

"(7) The transferors have filed O. S. No. 68 of 1901 in the Sub-Court of East Madura regarding this cowle land; and the transferee, with the knowledge of the objections raised by the defendants therein, has obtained this document. Hence the success or failure and profit or loss in respect of the said case concerns the transferee.

(8) It has been agreed upon that the transferee should get the encumbrances in respect of this cowle land settled at his own expense and that he has no

future claim against the transferors regarding the same. Should there be laches on the part of the transferee in respect of such settlement, he is bound to pay permanently the entire thirva, etc. The transferors agree that, if in spite of proper efforts, he does not get the said land, he need not pay the thirva, etc., mentioned in para. 3 above. But, for this or any other reason, the transferee has no right whatsoever to claim at any time the return of the Nazir of Rs. 3000 paid by him as mentioned in para. 3 above or any portion thereof.

(9) In O. S. No. 68 of 1901 now pending in the Sub-Court of East Madura, the transferors and transferee should file a petition in the Court to the effect that the transferee should at once be made a supplemental plaintiff, and both should be parties in all future proceedings and the transferors should render help to the transferee. But the transferee himself should meet all the future necessary expenses of the said case from time to time. The transferee has obtained from the transferors the records relating to the said case. It has been agreed upon that, as regards the amounts hitherto spent by the transferors, in the said case, they have no claim or concern whatsoever and that if it is decreed that the defendants should pay costs to the plaintiffs in the said suit, such entire costs belong to the transferee. As regards the amount of expenses that may have to be incurred by the transferors continuing to be parties in future, the transferee is bound to pay the same from time to time.

(10) If, for any reason, it is decided in O. S. No. 68 of 1901 on the file of the Sub-Court of East Madura or in the appeals, etc., relating thereto that the transferors should pay any costs, etc., to the defendants, the transferee himself is bound to pay the same."

The land "mentioned hereunder" is thus described:

"West of the south to north channel flowing to Karaikudi-Kallukatti urani and of Kottayur cart-track and of K. R. Subbayya Servaikarar's cowle land, north of the said channel and of Sekkalakottai boundary stones, east of the old boundary stone of Karaikudi, Kalanivasal and Sekkalakottai villages and of the demarcation boundary stones and of Karaikudi konmoi channel and south of the cowle (land) of K. R. Subbayya Servaikarar; within these, land of about Kurukkams 13.4.2."

This description is practically identical with the description in the plaint in the Suit No. 68 of 1901. The crucial question is what land did the respondents' lease, upon its true construction, include? In order to ascertain its true construction, the whole document must be considered, and not merely the so-called "description of property" at the end thereof. Further in their Lordships' opinion it is proper in this case to take into consideration the simultaneous lease to Suppaya, for it is common ground, as stated by the trial Judge, that the one begins where the other ends. Turning to the respondents' lease, if it shows anything clearly it shows, in their Lordships' opinion this, that the land intended to be leased was only the land which was the subject-matter of dispute in the Suit O. S. No. 68 of 1901. Clause 3 says so in express terms, and makes the thirva run only from the fasli when the transferee gets possession. Clause 7 repeats the statement. Clause 8 emphasises it from another angle, by relieving

the transferee from all liability for thirva, road cess or railway cess "if in spite of proper efforts he does not get the land," meaning (necessarily as their Lordships think in view of cl. 9) if he does not get the land as the result of the suit. It appears to them inconceivable that the lease was intended to include any land other than the suit land, for, apparently, the transferee would be under no liability to pay thirva, etc., for that other land if the suit was unsuccessful although his right to possession of it did not depend on the issue of the litigation. Reference to the appellants' lease only confirms this view. His land is stated to be bounded on the west by, among other things, "the land granted on cowle to . . . Karuthan . . . and forming the subject-matter of the suit in O. S. No. 68 of 1901," a condition of things which would not permit of any land intervening between that suit land and the land leased to Suppaya.

Only one factor remains to be ascertained, viz., what was the land which was the subject-matter in dispute in the suit, O. S. No. 68 of 1901? As to that there can now be no doubt. The Court settled the question by appointing a commissioner for the express purpose of defining the land beyond question. It was the land marked red on the commissioner's plan F and no other. It was by reference to that plan and the land so marked thereon, that the Subordinate Judge of Madura made his decree. But the matter does not end there. The appellants' lease contained the plan G, which shows a plot of land marked red identical with the red-marked plot in plan F, and describes it as the suit land in O. S. No. 68 of 1901, and as containing about kurukkams 13.4.2, which is the area stated in the respondents' lease to be the estimated area of the land described therein. When all these facts are taken into consideration they can, their Lordships think, lead only to one conclusion, viz., that the respondents' lease was only intended to include, and upon its true construction only does include, the land marked red on the two plans F and G. Karuthan took a speculative lease for which he was prepared to pay Rs. 3000 viz. a lease of lands of which he would never get possession if the suit failed, but in respect of which he was under no further liability unless and until he obtained possession, as a result of the suit being successful.

The High Court were of opinion that the respondents' lease showed the boundaries with certainty and precision: but those are the same boundaries which necessitated the appointment of a commissioner in the Suit No. 68 of 1901 in order that they might be ascertained with certainty and precision; and the result

was the fixing of the plot coloured red in plan F, which is repeated on the plan G. Further, the High Court seem to have thought that the decree in the suit covered more than the land coloured red on plan F; but this would appear to be a misapprehension. The judgment of the Subordinate Judge of Madura and the operative portion of the decree are in express terms confined to the land coloured red on the commissioner's plan. Their Lordships are of opinion that this case does not come within any of the authorities cited by the High Court. It depends upon the true construction of the special terms of the respondents' lease which, when all its provisions are taken into consideration, shows that the dominant intention of the parties thereto was to confine it to the land, possession of which would be recovered in the event of the suit being successful, i. e., the land coloured red on the plans F and G. That was in substance the view of the trial Judge, whose decree should be restored. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The respondents will pay the costs of the appellants of the appeal to the High Court and of the appeal to His Majesty in Council.

G.N.

*Appeal allowed.*Solicitors for Appellants — *Lambert & White.*

Solicitors for Respondents —

*Douglas Grant & Dold.***A. I. R. (31) 1944 Privy Council 83***(From Lahore: ('40) 27 A.I.R. 1940
Lah. 186)*

19th April 1944

LORD RUSSELL OF KILLOWEN, LORD
JUSTICE GODDARD AND SIR
MADHAVAN NAIR*Mohindar Singh — Appellant*

v.

*Ramindar Singh and another —**Respondents.*

Privy Council Appeal No. 36 of 1942.

(a) Arbitration—Extent of submission.

The subject of the submission to arbitration held to be the whole dispute and not merely the matter of the appeal. [P 84 C 2]

(b) Arbitration — Submission to non-lawyer relative — Award just as expected from layman cannot be impugned.

Although the decision given by an arbitrator be not one that a Court would have given, nor was it one that would have been given by an arbitrator who was also a lawyer if the parties have chosen to submit their disputes to a relative whom they trusted and who was not a lawyer, and he has given just the sort of award that might be expected from a lay arbitrator in the circumstances, the validity of the award cannot be impugned. [P 84 C 2; P 85 C 1]

*S. P. Khambatta — for Appellant.**C. S. Rewcastle and J. M. Parikh —**for Respondents.*

Lord Justice Goddard—This appeal is from a judgment and decree of the High Court at Lahore upholding the award of an arbitrator dated 11th December 1937. The circumstances under which the arbitration came to be held are that in the year 1931 the present appellant took proceedings in the Court of the Senior Subordinate Judge at Amritsar claiming possession of 132 kanals of land which he alleged were sold to him by respondent 1 who was originally the sole defendant. His case was that the land had been bought for him by Ujagar Singh, as benamidar, for the sum of Rs. 15,500, and this person was subsequently added as a defendant 2. The defendant's case was that he had never sold anything to the plaintiff; he had sold the occupancy but not the proprietary rights in his land to Ujagar Singh who was a real purchaser and not a benamidar for the plaintiff but who had practised a fraud upon him. Then he said that under a threat of criminal proceedings Ujagar had cancelled the sale deeds and the money which had passed was returned. Ujagar Singh filed a written statement denying that the land was sold to the plaintiff or that he (Ujagar) was benamidar for him. It was not till 31st August 1936, that judgment was given in the suit. It was tried before the Subordinate Judge, Third Class at Amritsar, who found for the plaintiff. He found that the sale to Ujagar Singh was benami, that the plaintiff was the real purchaser, that the defendant had received Rupees 15,500 as the purchase price and that no fraud was proved, but disapproving of the plaintiff's conduct in several respects he awarded no costs. On 1st October 1936, defendant 1 appealed to the Court of the District Judge and on 3rd February 1937, the plaintiff filed a cross-objection as to costs; but on 27th November 1937, the parties came to an agreement to refer their disputes to arbitration and petitioned the Court to remit the appeal to the arbitrator they had chosen. The agreement is in these terms:

"We, the parties, of our own accord have appointed S. Amar Singh, Police Inspector, C.I.A. Railway Police, Lahore, as our sole arbitrator for settlement of all our disputes in this case. We therefore pray that the appeal case may be handed over to the said arbitrator. The award given by him shall be accepted by us without any objection."

The same day the Court made an order in these terms:

"This case is referred to the arbitration of S. S. Sandra Amar Singh, Inspector of Police, Lahore. He would submit his award by 13th December 1937."

The parties attended before the arbitrator on 6th and 8th December and were represented by counsel. It is to be observed that the arbitrator was a relation, a second cousin, to both parties. According to the evidence of the

arbitrator he gave both parties an opportunity of calling evidence, but they did not desire so to do but seem to have read to him the papers in the case and to have gone into all the facts from the beginning of the dispute between them. On 11th December the arbitrator made his award. He awarded that the land should be given to the defendant, the present respondent 1, and ordered him to pay back Rs. 15,000 by two instalments. In substance therefore he cancelled the sale and put the parties back into their original position except as to the difference between Rs. 15,500 and Rs. 15,000.

The appellant here filed objections to the award in the Court of the District Judge. The only objection material for the purpose of his appeal was that the arbitrator was bound to find whether or not the title to the land had passed to the appellant and that he had no jurisdiction to award him money instead of land. Compendiously, his contention was that the arbitrator could only deal with the appeal and decide whether the judgment of the learned Subordinate Judge was right, whereas the respondent contended that the whole dispute between them was referred to the arbitrator, though no doubt his award would in one way or another have to dispose of the appeal. The Additional District Judge decided in favour of the validity of the award but remitted the matter to the High Court as it involved a sum of Rs. 15,000 which was beyond his jurisdiction. On 18th December 1939, the High Court delivered judgment, upholding the award and it is from this judgment that the present appeal is brought.

Their Lordships are of opinion that the subject of the submission to arbitration clearly was the whole dispute and not merely the matter of the appeal, and the order of the Court referring the matter confirms this view. Had the parties meant only to refer the appeal it would have been quite easy to say so, but the words they have used indicate that the whole case was to be heard *de novo* by the arbitrator who was to settle "all our disputes in this case." It is hardly probable that had the parties intended to refer only the question whether the judgment of the learned Subordinate Judge was right they would have selected a layman as their arbitrator, whereas if, weary of the delay involved in litigation, they wanted a decision on the merits it was quite natural for them to select an arbitrator of equal relationship to both of them who from the position that he held might be trusted to give an impartial decision. True the decision he gave was not one that a Court could have given, nor was it one that perhaps would have been given by an arbitrator who was also a lawyer. But for better or worse they

chose to submit their disputes to a relative whom they trusted and who was not a lawyer, and he has given just the sort of award that might be expected from a lay arbitrator in the circumstances. In their Lordships' opinion there is no ground for impugning the validity of this award and they will humbly advise His Majesty that this appeal should be dismissed with costs.

R.K. *Appeal dismissed.*
Solicitors for Appellant — T. L. Wilson & Co.
Solicitors for Respondents — Hy. S. L. Polak & Co.

A. I. R. (31) 1944 Privy Council 85 (From Allahabad)

12th June 1944

VISCOUNT SANKEY, LORD THANKERTON
AND SIR MADHAVAN NAIR

Batey Krishna — Appellant

v.

Parsotam Das and others — Respondents.

Privy Council Appeal No. 24 of 1943; Allahabad Appeal No. 29 of 1937.

Limitation Act (1908), Art. 132—Charge created by decree in mortgage suit in favour of person paying other mortgages on the same property—Suit by charge-holder within 12 years of decree held within time though after 12 years from date of payment or due dates of mortgages paid off.

B mortgaged seven villages in February 1909 to *A*; the money was to become payable in February 1912. In July 1910 *B* sold 8 annas share in four out of seven villages to *J*, father of *P*. *J* became owner of 7 annas share in a partition between the brothers. In March 1915 *B* mortgaged remaining 8 annas share in the four villages mentioned above and the remaining three entire villages in favour of *D*. *A* brought a suit on his mortgage of 1909 and obtained a decree for sale in July 1915. *P* paid *A* in June 1917 the decretal amount. In June 1915 *B* mortgaged the very property to *G*, the money was to become payable in June 1918. *P* redeemed this mortgage in April 1917. On that very day *B* executed a further mortgage to *L* (benamidar of *P*). *D* as subsequent mortgagee sued on his mortgage of 1915 and three other deeds making *P* a party. A pre-foreclosure decree was passed but subject to charge of *P* for the two sums paid on account of the two mortgages. Ultimately a final foreclosure decree was passed. *P* then brought a suit for the sums due to him as a charge :

Held that the decree passed in *D*'s suit created a charge in favour of *P* and not merely declared a charge which had existed before. *P* by making the two payments had subrogated himself to the rights of the mortgagees whom he paid off, and the rights which he had thus obtained became merged in the decree passed in the foreclosure suit. The suit being within 12 years of this decree was not barred by time. [P 87 C 1]

W. Wallach — for Appellant.

C. S. Rewcastle and S. P. Khambatta — for Respondents.

Sir Madhavan Nair.—This is an appeal from a decree of the High Court of Judicature at Allahabad dated 1st April 1937, which

affirmed a decree of the Court of the Subordinate Judge of Cawnpore dated 5th September 1932, dismissing the plaintiff's suit. The plaintiff died during the pendency of the appeal in the High Court, and by an order of the Court, his son, the appellant before the Board, was brought on the record as the plaintiff-appellant in his place. The suit, out of which the appeal arises, was brought by the plaintiff to recover a sum of Rs. 45,765-6-3 as a charge against the properties specified in the plaint in the circumstances mentioned below. The sole question for decision is whether the suit is barred by limitation. The provision of the Limitation Act (Act 9 of 1908) applicable, is Art. 132, which prescribes a period of "twelve years" for a suit "to enforce payment of money charged upon immoveable property," and time begins to run "when the money sued for becomes due." The facts necessary for the disposal of the appeal may be briefly stated:—The properties in the suit numbering seven villages, belonged to one Mt. Baktawar Begum. On 11th February 1909, she mortgaged them for Rs. 5000 to Syed Abid Husain. The money became payable to her on 10th February 1912. On 27th July 1910, she sold an eight annas share in four of the seven villages to Indar Prasad, the brother of the plaintiff, Jagmohan Das. By a partition of the joint family property of the plaintiff's family, the plaintiff became the owner of a seven annas share in the said villages.

On 12th March 1915, Mt. Baktawar Begum executed a mortgage of the remaining eight annas share of the four villages mentioned above, and of the three entire villages in favour of Parsotam Das, defendant-respondent 1, and Jugal Kishore, the father of defendant-respondent 2. Syed Abid Husain instituted a suit on his mortgage of 11th February 1909, and obtained on 24th July 1915, a decree for sale in respect of the properties mortgaged to him. In order to save them from being sold in execution of the decree, the plaintiff paid Abid Husain on 19th June 1917, the decretal sum of Rs. 6151-13-0. On 22nd June 1915, Mt. Baktawar Begum had executed a mortgage of the above properties in favour of Ganga Dhar and Gobardhan Das. The money under the bond became due on 21st June 1918. The plaintiff redeemed this mortgage by paying the mortgagees Rs. 4552 on 3rd April 1917. On that date Mt. Baktawar executed a further mortgage in favour of one Girdharilal who was a benamidar for the plaintiff. The dispute between the parties to the suit now under appeal relates to the two sums paid by the plaintiff to Abid Husain, and Ganga Dhar and Gobardhan

Das, respectively. Jugal Kishore and Parsotam Das (father of defendant 2, and defendant 1) as subsequent mortgagees instituted in the Court of the Subordinate Judge of Mohanlalgang, Lucknow, suit No. 13/39 of 1927, for foreclosure on the basis of the mortgage dated 12th March 1915, and three other deeds which had been executed by Mt. Baktawar Begum mortgaging the properties in the seven villages referred to above. Jagmohan Das, the plaintiff in the present suit and his brother Indar Prasad were defendants 3 and 4 in the said suit. Issue 3 in the suit was, "To what extent are defendants 3 and 4 entitled to priority against the deeds in suit?" The Subordinate Judge decided the suit in favour of the plaintiffs. The judgment concluded as follows :

"The foreclosure will be subject to a declaration of the following rights and charges of defendant 3 in respect of which he has a priority over the plaintiffs.

(A)

(B) A charge of Rs. 6151-13-0 or for such lesser amount if any as may be found due to defendant 3, in respect of the deed dated 3rd April 1917.

(C) A charge of Rs. 4542, or for such lesser amount if any as may be found due to defendant 3, in respect of the deed dated 3rd April 1917.

Charges (B) and (C) operate in respect of 16 annas share in three villages, 8 annas share in four villages and one house, the entire property covered by plaintiffs' first three deeds. Charge (C) has priority in respect of the 2nd and 3rd deeds of the plaintiffs, but not in respect of the first deed."

A decree in accordance with the judgment of the Subordinate Judge was passed on 27th May 1927. An appeal from the said decree was dismissed by the Chief Court of Oudh on 26th April 1928. An appeal from the decree of the Chief Court was dismissed by the Privy Council on 20th April 1931. Having obtained his rights judicially determined and safeguarded, the plaintiff, as already mentioned, instituted on 31st July 1931, the suit out of which this appeal arises for the sums due to him which then amounted to Rs. 45,775-2-3 by the sale of the mortgaged properties, impleading as defendant 1, Parsotam Das (decree-holder 2 in the foreclosure suit), and defendant 2, Devandra Nath (the son of decree-holder 1). The other defendants were the heirs of Mt. Baktawar Begum who had died and the subsequent transferees of some of the mortgaged properties. In paragraph 12 of the plaint, the plaintiff stated that "the cause of action for the suit arose on 20th April 1931, the date of the Privy Council decision." The contesting defendants (respondents) raised various defences of which the only one with which the Board is now concerned was that the suit is time-barred. On this question, with respect to which issue 3 in the suit "Is the suit barred by limitation" was framed, the Courts in India held that the

12 years' period of limitation prescribed by law for the enforcement of a charge expired before the suit was filed on 20th July 1931, and that it is therefore barred by time. It is not necessary for the purposes of this appeal to examine the reasoning of the learned Judges as to when exactly the time began to run, whether from the time when the money became due under the mortgage bonds, or from the dates of payments made by the plaintiff, as in either case the period had expired ; and further, the question in this particular form was not presented for their Lordships' consideration ; nor does it arise in the view that they take of the ground on which their decision in this case should be based. The position taken up by the plaintiff in the plaint, that the cause of action for the recovery of the amount by enforcement of the charge accrued to him on the date on which their Lordships of the Privy Council delivered their judgment in the appeal, i. e. 20th April 1931, was not maintained by him before the High Court, where it was contended on his behalf, relying on cl. (2) of S. 20, Limitation Act, that the suit is within time "because of certain payments alleged to have been appropriated by the defendants during their possession." Section 20, cl. (2), Limitation Act, is as follows :

"Where mortgaged land is in possession of the mortgagee the receipts of rent or produce of such land shall be deemed to be payment for the purpose of sub-section (1)," —

which deals with "the effect of payment of interest as such or part payment of principal" before the expiration of the period of limitation. The learned Judges refused permission to the plaintiff to raise this ground as it was a new one raised for the first time in appeal, and required for its decision investigation of new facts. It may be stated that their Lordships have not been able to appreciate the significance of this new point raised by the plaintiff-appellant, but it is not necessary for them to consider it or the question whether or not the High Court was right in refusing him permission to raise it as Mr. Wallach, his learned counsel, does not now press it before the Board, his sole argument being that a charge was created in favour of the plaintiff by the decree passed by the Subordinate Judge of Mohanlalgang in Suit No. 13/39 (the suit for foreclosure) on 27th May 1927, and the present suit having been instituted on 31st July 1931, is well within the 12 years' period of limitation. It was also contended before the High Court "that a charge had been created in favour of the plaintiff by virtue of the judgment passed by the learned Subordinate Judge of Lucknow," but the contention •

was rejected, the learned Judges stating amongst other things that the effect of the decision of the Subordinate Judge was merely that "he declared that the plaintiff has a right to recover the amount due by enforcing his claim in a separate suit." The short question for their Lordships to consider is whether the decree passed by the Subordinate Judge created a charge in favour of the plaintiff for, if it created a charge, it is not disputed that the suit is in time. Mr. Rewcastle, the learned counsel for the respondents, has argued that the decree only declared a charge which had existed before, but did not create one. Their Lordships are unable to accept this argument. Attention has already been drawn to the concluding portion of the Subordinate Judge's judgment in the foreclosure suit. Incorporating this portion in it (*see para. 2*), a preliminary decree for foreclosure in the usual form prescribed under O. 34, R. 2, Civil P. C., was passed and it stated

"if the decretal amount with costs is not paid within six months, i. e. on or before 27th November 1927, the one anna share . . . will be sold and the defendants shall be debarred from all rights to redeem the property . . ."

This must have been followed subsequently by a final decree, though it has not been filed, for it is admitted that the respondents have been and are in possession of the properties. The plaintiff by making the two payments mentioned above had subrogated himself to the rights of the mortgagees whom he paid off, and the rights which he had thus obtained became merged in the decree passed by the Subordinate Judge in the foreclosure suit. In the circumstances, it is clear to their Lordships that the rights which the defendants have obtained can only be subject to the qualification of the rights of the plaintiff, i. e. a charge in favour of the plaintiff must be held to have been created by the final decree in Suit No. 13/39 of 1927. That this should be the normal construction of the final decree is not denied, and their Lordships think rightly, by the learned counsel for the respondents. Viewed in this light, it is not disputed that the present suit to enforce the charge is within time. In the result their Lordships will humbly advise His Majesty that this appeal should be allowed and that the appellant should be given a decree as prayed for, with costs throughout.

R.K.

*Appeal allowed.*Solicitors for Appellant — *T. L. Wilson & Co.*Solicitors for Respondents — *Harold Shephard.***A. I. R. (31) 1944 Privy Council 87***(From Lahore)*

17th May 1944

LORD THANKERTON, LORD WRIGHT AND
SIR MADHAVAN NAIR*N. R. Kapur — Appellant*

v.

*Murli Dhar Kapur and another
Respondents.*

Privy Council Appeal No. 12 of 1943.

Practice — Privy Council—Question of fact —
Questions as to inclusion or exclusion of items
in partnership accounting are questions of fact.Questions as to the inclusion or exclusion of certain items raised in making up a partnership account on the dissolution of a partnership are pure questions of fact and ought not to be made the subject of an appeal to His Majesty in Council : ('42) 29 A. I. R. 1942 P. C. 61, *Foll.* [P 87 C 2; P 88 C 1]*C. S. Rewcastle and W. Wallach — for Appellant.**Sir T. Strangman and S. P. Khambatta —
for Respondents.*

Lord Thankerton.—Their Lordships are of opinion that this appeal should not be allowed to proceed as not presenting, apart from one possible point which will be mentioned in a moment, proper subject-matter for an appeal to His Majesty in Council. In the first place, the point upon which a different argument might be suggested, is the point with reference to the outstandings, which is contained in reasons 2 and 3 of the appellant's case. In their Lordships' opinion the matter was rightly decided by the High Court, and there is no substance in the argument suggested to the contrary. It is a question of construction of the partnership deed, and the phraseology of Art. 10 of the partnership deed, in their Lordships' opinion, does not present any such difficulty as would admit a contrary view to the view expressed by the High Court. The remaining three reasons upon which Mr. Rewcastle addressed their Lordships, were reasons 7, 8 and 9. In the opinion of their Lordships, all three are concerned with ordinary items of accounting in the taking of a partnership account and would fall under the principle laid down in the judgment delivered by Lord Romer in the case of *Lala Hakim Rai*, on 22nd June 1942,¹ which is referred to in the practice note in 69 I. A. 172.

In the present appeal, their Lordships are unable to find, apart from the reason already dealt with, any question of principle whatever, and the items concerned in these three reasons are just ordinary items, questions as to the inclusion or exclusion of which are raised, in making up a partnership account on the dissolution of a partnership. The first reason —

1. Reported in ('42) 29 A.I.R. 1942 P. C. 61: I.L.R. (1942) Kar.P.C. 157, *Lala Hakim Rai v. Ganga Ram*.

reason 7—relates to four payments, made to members of the family of one of the partners which were disallowed by the Subordinate Judge and were allowed by the High Court. This seems to be a pure question of fact and Mr. Rewcastle was prepared to admit that these were original liabilities of the firm; in any event, the Subordinate Judge's finding is very much vitiated by the fact that he has ignored the accounts of the firm, which was still running, in 1933, in which these are acknowledged as liabilities of the firm. That leaves the question whether in fact they had been discharged and if discharged by whom they had been discharged. There is no trace of any claim being made by the original creditors on the ground that the debts are alive. In any event, that seems to be a pure question of fact and they are just the kind of items in an accounting, such as are covered by the decision of this Board in 1942.

The next reason is reason 8. That is the liability of one of the partners, other than the appellant, to account for a sum which admittedly he has collected from the debtors, the firm of Aux Elegantes. The amount is alleged to be Rs. 2400 which would benefit the particular appellant to the extent of Rs. 800. It is just a typical item in accounting, viz., the liability of a partner to account to the firm, and in their Lordships' opinion is clearly covered by that previous decision. That leaves reason 9, which came to very little, because Mr. Rewcastle agreed that sufficient provision is made in the judgment of the High Court on page 205, at line 20, for his taking credit for this debt in reduction of any sum, execution for which is sought to be enforced against him. In fact, under the decree of the High Court, he had a decree pronounced against him for a sum of Rs. 22,000, so that there is ample from which to deduct the amount of this debt. It is clear that if, rather than have execution against him, he is ready to pay up under the decree, he would be entitled to have credit for this amount. Therefore there seems to be nothing in that point at all. For these reasons, their Lordships think that these questions are of the type which should not be entertained by their Lordships by way of appeal. Accordingly their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

R.K.

*Appeal dismissed.*Solicitors for Appellant — *T. L. Wilson & Co.*

Solicitors for Respondents —

*Barrow Rogers & Nevill.***A. I. R. (31) 1944 Privy Council 88***(From Bombay : ('41) 28 A. I. R. 1941 Bom. 374)*

27th June 1944

LORD THANKERTON, LORD WRIGHT AND
SIR MADHAVAN NAIR*All India Spinners Association of Mirzapur, Ahmedabad — Appellant*

v.

*Commissioner of Income-tax, Bombay
Presidency, Sind and Baluchistan —
Respondent.*

Privy Council Appeal No. 64 of 1942.

(a) Income-tax Act (1922), S. 4 (3) (i) — All India Spinners Association established to develop spinning and khaddar held came within exemption under S. 4 (3) (i).

The dominant object and purpose of the All India Spinners Association, an unregistered and unincorporated association of individuals, was the development of spinning and khaddar. Though it was established with the consent of the All India Congress Committee as an integral part of the congress organisation it had independent existence and powers unaffected and uncontrolled by politics. Out of the funds in its hands which were mostly contributed by donations from the public and subscriptions from the members of the Association, the Association bought charkhas and handlooms and supplied them to the poor people free of charge. It further bought raw cotton and gave the same to the said persons for spinning yarn out of it which yarn was then given out to other poor people for hand-weaving into cloth. The wages paid to the spinners and weavers were not based on the current wages prevailing for similar work but were fixed on the basis of giving to the said persons as far as possible an income sufficient to enable them to support their families. The cloth so woven was sold in the khaddar stores established by the Association. The price charged to the public for such cloth was calculated on the basis of the cost price incurred by the Association in the manner hereinbefore stated plus a certain percentage for shop and overhead charges, without any reference to or connexion with the demand for the same and the price of similar mill cloth sold in the market. In the ordinary course the monies realised by the Association by such sales were a little more or less than the cost calculated on the aforesaid basis. When there was a surplus in the amount realised by the sale of cloth, such surplus was utilised in the same manner as the other funds of the Association inter alia in getting yarn and cloth manufactured and providing wages for the persons engaged in such manufacture. There was no question of profit-making in the activities of the Association. "The funds and assets" held by the All India Spinners Association were to vest in the board of trustees, who were also to be the executive council and "to hold the same for the purposes of the Association." The council of the Association was to have independent existence and they were to do all things which may be necessary for the furtherance of its objects. There was a special provision enabling the council to act as an agency on behalf of the Congress to receive self-spun yarns as subscriptions to the Congress. There was no power to distribute any surplus income among its members. Every person wishing to join the Association must sign an application to be enrolled stating that he had read the rules and forwarding his subscription :

Held that (1) on a fair construction of the constitution of the Association it could not be said that no

trust or legal obligation was created binding the Association or its trustees or council to devote the property of the Association from which the income was derived to the purposes for which the Association was formed. The constitution was a written instrument, the terms of which bound not only the trustees and council, but the members who by their application for membership accepted its rules. Any departure either by the trustees or council or members from the rules would be a breach of trust or legal obligation which the Court could restrain. A formal deed was not necessary to constitute a trust, still less to constitute a legal obligation binding the trustees, the council and the members inter se. There was therefore a trust or at least legal obligation within the meaning of S. 4 (3) (i) under which the trustees or council were to hold the property of the Association for purposes of the Association. No doubt the rules of the constitution might be altered by the unanimous agreement of all the members. But that was immaterial so long as the rules remained unaltered; [P 92 C 1, 2]

(2) the property of the Association was not merely the cloth which from time to time was sold but the property consisted of the organisation and the undertaking as well as in the fluctuating stock of yarn and cloth. This property vested in the trustees and was "held" by them within S. 4 (3) (i): ('39) 26 A. I. R. 1939 P. C. 208, *Rel. on*; [P 92 C 2]

(3) the purpose of the Association was relief of the poor and included the advancement of other purposes of general public utility within the meaning of S. 4 (3) (i). The special provision enabling the council of the Association to act as an agency on behalf of the Congress to receive self-spun yarn as subscription to the Congress was a separate and independent matter apart from the general object of the Association and did not affect its freedom from political purposes; [P 93 C 1]

(4) the Association therefore came within the exemption under S. 4 (3) (i). [P 91 C 1]

(b) Income-tax Act (1922), S. 4 (3) (i) — Real object of Association relief of poverty — Connexion of Association with political organisation cannot make its object any less charitable.

If an association is set on foot by a political organisation and is connected with it but still has for its real object the relief of poverty, its connexion with the political organisation does not make its real object any the less charitable. [P 91 C 1]

(c) Income-tax Act (1922), S. 4 (3) — Words "charitable purpose" in — Construction of — Limits of section must be strictly observed — English decisions if may be considered.

The construction of the words "Charitable purpose" in S. 4 (3) must be based on the actual words used in the section and is not to be governed by English decisions on the topic. The English decisions on the law of charities are not based upon definite and precise statutory provisions. They have been developed in the course of more than three centuries of the Chancery Court. The modern English law of charities can only be ascertained by considering a mass of particular decisions often difficult to reconcile. Section 4 (3), Income-tax Act, gives a clear and succinct definition of "charitable purpose" which must be construed according to its actual language and meaning. English decisions have no binding authority on its construction and though they may sometimes afford help or guidance, cannot relieve the Indian Courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life. In considering whether a purpose is charitable, limits

fixed by S. 4 (3) must be strictly observed and its definition must be satisfied. The Court might in proper cases refuse to admit as charitable schemes, purposes eccentric or impracticable. [P 91 C 2; P 92 C 2; P 93 C 1]

(d) Income-tax Act (1922), S. 4 (3) (i) — What is purpose of Association — Question is one of law.

The construction of S. 4 (3) (i) is obviously a question of law, but so also is the question what is the real purpose of an Association. The Court must make its decision on the latter point on the basis of the facts found for it, but given the facts the question is one of law. When in a particular case the principal fact is the constitution of the Association the true construction of the constitution for finding out its purpose is a question of law. [P 92 C 2]

(e) Income-tax Act (1922), S. 4 (3) (i) — Words "general public utility" in S. 4 (3) (i) — Meaning of.

The words "general public utility" in S. 4 (3) (i) are very wide words. They would exclude the object of private gain, such as an undertaking for commercial profit though all the same it would subserve general public utility: ('39) 26 A. I. R. 1939 P. C. 208, *Ref.* [P 93 C 1]

Roland Burrows and C. J. Colombos —

for Appellant.

J. Millard Tucker and L. M. Jopling —

for Respondent.

Lord Wright. — This is an appeal from an order dated 8th April 1941 of the High Court of Bombay (Sir J. W. F. Beaumont, C. J. and Wadia J.) answering adversely to the appellant a question contained in a reference under S. 66 (3), Income-tax Act, 1922, (hereinafter called "the Act") made by the respondent dated 20th March 1941. The year of assessment concerned is the year 1936-37 the relevant accounting year being the year ended 31st December 1935. Throughout the accounting year and the year of assessment the appellant was an unregistered and unincorporated association of individuals. Its activities consisted in the acquisition of yarn, and also raw cotton, which was then given out to various poor people to be spun by them into yarn all of which yarn was then given out to other poor people for hand-weaving into cloth. The cloth so produced for the appellant was then sold by the appellant. During the relevant accounting year these activities resulted in a profit to the appellant. The appellant also had income from interest during the same year and the appellant was assessed to income-tax and super-tax for the year 1936-37 on the whole of such profit and income. The question at issue in this appeal is whether the appellant was for the year 1936-37, exempt from liability to income-tax and super-tax under S. 4 (3) (i) of the Act, on the ground that the whole of the profit and income in question was "income derived from property held under trust or other legal obligation wholly for charitable purposes." This depends on the true construction as applied to the facts of the case of S. 4 (3) (i) of the Act which is as follows:

“(3) This Act shall not apply to the following classes of income : (i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto * * *

In this sub-section ‘Charitable purpose’ includes relief of the poor, education, medical relief and the advancement of any other object of general public utility.”

The facts stated in the reference can be summarised as follows: The appellant was formed in the year 1925, and had its origin in a resolution of the All India Congress Committee passed in 1925. It was started for the purpose of the development of the village industry of hand-weaving (called “khadi”) and the weaving of cotton material (called “khaddar”) by the use of hand looms. The constitution of the appellant is set out in a document without date or signature (Ex. “G” of the record) which was contained in a publication by the appellant called the “Khadi Guide,” published in 1931. Clause 1 of this document is in the following terms :

“Whereas the time has arrived for the establishment of the expert organisation for the development of the hand-spinning and khaddar and whereas experience has shown that such development is not possible without a permanent organisation, unaffected and uncontrolled by politics, political changes or political bodies, an organisation called the All India Spinners’ Association is hereby established with the consent of the All India Congress Committee as an integral part of the Congress organisation but with independent existence and powers.”

Certain of the other clauses of the document read as follows :

“Clause 2 (A). The said Association shall consist of members and associates and donors hereinafter defined and shall have a Board of Trustees who shall also be the Governing Body of the Association.”

Clause 2 (B) also contains the names of the members of the Board of Trustees and Executive Council, which included Mahatma Gandhi and Pandit Jawaharlal Nehru.

“Clause 3. That the funds and assets now held by the All India Spinners’ Association and its various branches shall vest in the Board of Trustees who shall also be the Executive Council of the Association, and they shall hold the same for the purpose of this Association.

Clause 4. The Council shall have the right to raise loans, to collect subscriptions, to hold immovable property, to invest funds under proper security, to give and take mortgage for the furtherance of hand-spinning and khaddar, to give financial assistance to khaddar organisations by way of loans, gifts or bounties, to help or establish schools or institutions where hand-spinning is taught, to help and open khaddar stores, to establish a khaddar service, to act as agency on behalf of the Congress to receive self-spun yarn as subscription to the Congress and to issue certificates and to do all the things that may be considered necessary for the furtherance of its objects, with power to make regulations for the conduct of affairs of the Association of the Council and to make such amendments in the present constitution, as may be considered necessary from time to time.”

Later clauses of the constitution stated the

conditions under which persons could become members of the Association. In particular they were to be over 18 years of age, habitually wearing khaddar, and depositing regularly with the Council each month 1000 yards of self-spun yarn well twisted and uniform. The method by which the appellant worked, and the manner in which its profits were earned were as follows: Out of the funds in its hands which have mostly been contributed by donations from the public and subscriptions from the members of the Association, the Association buys charkhas and handlooms, and supplies them to the inhabitants of villages within the limits of the various branches of the Association free of charge and further buys raw cotton and gives the same to the said persons for the purpose of spinning yarn from such cotton. The Association gives a certain wage to the said persons which, in some cases, is the sole source of income to those persons and in others adds to the earnings of the said persons so as to enable them to maintain and support their families. The yarn so spun is taken over by the Association and supplied to the other persons for weaving cloth on handlooms. The Association also buys hand-spun yarn from the said persons who have spun the same out of their own raw cotton, paying them for the same on the basis of the cost of the raw cotton and the wages for spinning the same into yarn. The persons to whom all the yarn is handed over for weaving are also paid a certain wage sufficient either in itself or as an addition to the other income of the persons to maintain and support their families. The wages so paid to the spinners and weavers are not based on the current wages prevailing for similar work but are fixed on the basis of giving to the said persons as far as possible an income sufficient to enable them to support their families. The cloth so woven is taken over by the Association and is sold in the khaddar stores established by the Association in various centres by the branches of the Association. The price charged to the public for such cloth is calculated on the basis of the cost price incurred by the Association in the manner hereinbefore stated plus a certain percentage for shop and overhead charges, without any reference to or connexion with the demand for the same and the price of similar mill cloth sold in the market. In the ordinary course the monies realised by the Association by such sales are a little more or less than the cost calculated on the aforesaid basis. When there is a surplus in the amount realised by the sale of cloth, such surplus is utilised in the same manner as the other funds of the Association inter alia in getting yarn and cloth manufac-

tured and providing wages for the persons engaged in such manufacture. The Commissioner duly referred the following question with his opinion to the High Court :

"Whether having regard to the objects of the Association and the manner in which they are carried out and the purpose for which its funds are applied, the income of the Association is liable to income-tax and/or super-tax."

His opinion was in substance that the dominant purpose of the Association was political and therefore not charitable and that it was in any event not a charitable purpose, the object of the Association being the promotion and organisation of the hand-spinning and weaving industry which was carried out on a strictly trading basis and was in no way different from the activity of a trading concern. The wages paid to the workers were based on the work they did and not on their needs. The object he thought was not the relief of the poor, nor was the object one of general public utility. At most only a section of the general public could benefit from it. On the reference coming before the High Court in Bombay, constituted by the Chief Justice and Wadia J., they answered the question in the affirmative. They based their decision on the ground that assuming as they did for the purpose of the case that the object was the relief of the poor, it still did not fall within S. 4 (3) of the Act, because the income was not derived from property held under trust or other legal obligation, for religious or charitable purposes. There was, they held, no trust deed nor any clear declaration of trust, and hence no legal obligation to dispose of the income for the purpose of getting yarn and cloth manufactured, and providing wages for the persons employed in the manufacture, though that had been the practice followed throughout by the appellant. On that ground alone they held that S. 4 (3) did not apply; Wadia J. however said

"if an Association is set on foot by a political organisation and is connected with it but still has for its real object the relief of poverty, its connexion with the political organisation does not in my opinion make its real object any the less charitable."

Their Lordships agree with that opinion. Their Lordships, however, do not feel able to concur in the decision of the High Court. In their judgment the appellant has brought itself within the exemption contained in S. 4 (3) (i), Income-tax Act, 1922. They hold that the income sought to be assessed is income derived from property held under trust or other legal obligation wholly for religious or charitable purposes on the basis of the statutory provision that "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility. It is now recog-

nised that the Indian Act must be construed on its actual words and is not to be governed by English decisions on the topic. The English decisions on the law of charities are not based upon definite and precise statutory provisions. They have been developed in the course of more than three centuries of the Chancery Courts. The Act of 43 Elizabeth (1601) contained in a preamble a list of charitable objects which fell within the Act, and this was taken as a sort of chart or scheme which the Court adopted as a ground work for developing the law. In doing so they made liberal use of analogies so that the modern English law can only be ascertained by considering a mass of particular decisions often difficult to reconcile. It is true that S. 4 (3) of the Act, has largely been influenced by Lord Macnaghten's definition of charity in (1891) A. C. 531¹ at p. 583, but that definition has no statutory authority and is not precisely followed in the most material particular; the words of the section are "for the advancement of any other object of general public utility" whereas Lord Macnaghten's words were "other purposes beneficial to the community." The difference in language, particularly the inclusion in the Indian Act of the word "public" is of importance. The Indian Act gives a clear and succinct definition which must be construed according to its actual language and meaning. English decisions have no binding authority on its construction and though they may sometimes afford help or guidance, cannot relieve the Indian Courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life.

The judgment appealed from treated the problem under two main headings: (1) was there a trust or other legal obligation under which the property from which the income was derived was held; (2) was that trust a legal obligation for the relief of the poor or for any other object of general public utility? In dealing with these questions it is in their Lordships' opinion necessary to examine the constitution of the appellant association. It is true that it is an unincorporated body of individuals, but it is assessable and chargeable as such under S. 3 of the Act, as amended by the India Income-tax (Amendment) Act, 1930, which includes every individual, Hindu undivided family, company, firm and other association of individuals as taxable.

Clause (1) of the constitution establishes the association as an organisation for the development of hand-spinning and khaddar.

1. (1891) A. C. 531, *Pemsel v. Commissioners for Special Purposes of Income-tax*.

This is the dominant object and purpose of the Association. It is to be a permanent organisation, unaffected and uncontrolled by politics, and though established with the consent of the All India Congress Committee as an integral part of the Congress Association, it is to have independent existence and powers. The statement of the object excludes in their Lordships' opinion any question of profit-making and also excludes any element of party politics. Any participation in political propaganda would be *ultra vires*. Under cl. (3) "the funds and assets" then held by the All India Spinners Association were to vest in the Board of Trustees, who were also to be the executive Council and "to hold the same for the purposes of the Association." Clause (4) defines the powers of the Council of the Association, which is to have independent existence and "they are to do all things which may be necessary for the furtherance of its objects." There is of course a special provision enabling the Council to act as an agency on behalf of the Congress to receive self-spun yarn as subscriptions to the Congress, but that has been rightly regarded as a separate and independent matter, apart from the general object of the Association and not affecting its freedom from political purposes. There is no power to distribute any surplus income among its members. By cl. (20) every person wishing to join the Association must sign an application to be enrolled stating that he has read the rules and forwarding his subscription. On a fair construction of the constitution, their Lordships cannot agree with the opinion of the learned Judges that no trust or legal obligation is shown binding the Association or its trustees or council to devote the property of the Association from which the income is derived to the charitable purposes for which the Association was formed, assuming for the moment that the purposes were charitable within the meaning of the Act. It is not really questioned that the practice has been to use the surplus income for the purposes of the Association and that the business has been carried on in pursuance of the primary purpose in addition mainly by beneficiaries of the Association. The practice however is not enough. The purpose is to be ascertained from the constitution. In their Lordships' judgment its provisions already quoted show a trust or binding obligation so to carry it on. The constitution is a written instrument, the terms of which bind not only the trustees and council, but the members who by their application for membership accept its rules. Any departure either by the trustees or Council or members from the rules would be a breach of trust or legal obligation which

the Court could restrain. A formal deed is not necessary to constitute a trust, still less to constitute a legal obligation binding the trustees, the Council and the members inter se. Their Lordships hold that there is such a trust or at least that there is a legal obligation, which is all that the section requires. It is true that the rules may be altered by the unanimous agreement of all the members. But that is immaterial so long as the rules remain unaltered. The High Court have, it seems, attached too much importance to cls. (3) and (4) of the constitution and not sufficient importance to cl. (1), which is the constituent and dominant provision.

On that footing a question was suggested that the property of the association from which the profits were derived was not "held" within the meaning of the section. But cl. (3) provides expressly that the funds and assets of the association are to vest in the trustees, to be held for the purposes of the association. The High Court seem to have been of opinion that the property from which the profits were derived was the cloth which from time to time was sold. Their Lordships, however, prefer the view implied in the decision of the board in 66 I. A. 241,² to which fuller reference will be later made, where the "property" in question was the stock and goodwill of the press and newspaper. Here the property consisted of the organisation and the undertaking as well as in the fluctuating stock of yarn and cloth.

So far the case seems to fall within the exemption of the section. The second and more important point is whether the undertaking is a charity. Their Lordships are fully conscious of the importance of applying correct principles in such a matter and do not repeat the reasons for caution stated by the board in 66 I. A. 241² at p. 250. The limits fixed by the section must be strictly observed and its definition must be satisfied by the character of the association and its activities. Whether that is so depends on the true construction of the section and on the meaning and effect of the constitution which defines the character of the association. The construction of the section is obviously a question of law, but so also is the question what is the real purpose of the association. The Court must make its decision on the latter point on the basis of the facts found for it, but given the facts the question is one of law. In this particular case the principal fact is the constitution, the true construction of which is again

2. ('39) 26 A.I.R. 1939 P.C. 208 : I.L.R. 1939 Lah. 475 : 66 I. A. 241 : I. L. R. (1939) Kar. P. C. 337 (P.C.), *Tribune Press, Lahore v. Commissioner of Income-tax*.

a question of law. The High Court were prepared to assume (in the words of Wadia J.) that

"the real underlying object of the association was to benefit the poor agriculturists in the villages, specifically at that time of the year when they were not actively engaged in agricultural operations."

The Judges in India with their knowledge of Indian conditions are peculiarly qualified to form an opinion on these matters. But their Lordships see no sufficient reason to doubt the conclusion that the primary object of the association was the relief of the poor. That would be enough *prima facie* to satisfy the statute. But there is good ground for holding that the purposes of the association included the advancement of other purposes of general public utility. These last are very wide words. Their exact scope may require on other occasions very careful consideration. They were applied in 66 I. A. 241² without any very precise definition to the production of the newspaper in question under the conditions fixed by the testator's will. The board stated (at p. 256) that

"the object of the paper might be described as the object of supplying the province with an organ of educated public opinion"

and that it should *prima facie* be held to be an object of general public utility. These words their Lordships think would exclude the object of private gain, such as an undertaking for commercial profit though all the same it would subserve general public utility. But private profit was eliminated in this case. Though the connexion in one sense of the association with Congress was relied on as not consistent with "general public utility" because it might be for the advancement primarily of a particular party, it is sufficiently clear in this case that the association's purposes were independent of and were not affected by the purposes or propaganda of Congress. Nor is there any ground for the Court holding that the scheme is not one which "may be" for the public benefit. The Court might in proper cases refuse to admit as charitable schemes, purposes eccentric or impracticable. But though economists might differ about the wisdom of some aspect at least of the association's purposes, the Court could not hold that it was beyond the pale of legitimate charitable trusts. This general line of reasoning seems to accord with that of the board in 66 I. A. 241.² The English cases there cited do not turn on the words "general public utility," but they illustrate how Courts of first instance in England have actually dealt with the particular questions there submitted to them. Their Lordships are of opinion that the appeal should be allowed and the question submitted to the Court answered in the negative. The

respondent will pay the appellant's costs of this appeal and of the proceedings below. They will humbly so advise His Majesty.

G.N.

Appeal allowed.

Solicitors for Appellant — *Hy. S. L. Polak & Co.*

Solicitors for Respondent —
Solicitor, India Office.

A. I. R. (31) 1944 Privy Council 93

(*From Protectorate Court of
Somaliland Protectorate*)

18th May 1944

VISCOUNT MAUGHAM, LORD THANKER-
TON AND SIR MADHAVAN NAIR

Galos Hirad and another — Appellants

v.

The King.

Privy Council Appeal No. 29 of 1943.

Poor Persons Defence Ordinance No. 26 of 1939 (British Somaliland), S. 3 — Government assigning to accused counsel for conducting appeal — Appeal heard in absence of counsel will not stand.

The provisions contained in S. 3 as regards the right of a convicted person are not of a merely directory character. Sub-section (2) of that section provides that poor persons, to whom a counsel has been assigned by the Government, having been convicted at the trial are entitled as of right on lodging an appeal to have an advocate assigned to them for the preparation and also for the conduct of such appeal. The necessity for an assignment of counsel for the purpose of 'conducting an appeal' involves the necessity of seeing that it will be possible for the counsel to be present at the hearing. Hence, just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government who was unable, without any default on his part to reach the Court in time to conduct the appeal. [P 95 C 2; P 96 C 1]

J. D. Casswell and S. P. Khambatta —
for Appellants.

*Attorney-General (D. B. Somervell) and Kenelm
Preedy —* for the King.

Viscount Maugham. — In this case the appellants were charged in the Protectorate Court of the Somaliland Protectorate that on or about the first week in June 1941, at Hara-wati Balleh near Bohadle in the District of Burao, Somaliland, each of them did participate in a criminal act, namely intentionally causing the death of Corporal Nur Musa done by several persons in furtherance of the common intention of all and thereby committed the offence of murder punishable under ss. 34 and 302, Penal Code, which applies in the Protectorate. The trouble in this case seems to have originated shortly after the Italian forces had been driven out of British Somaliland by His Majesty's forces in the year 1941 and was caused partly at least by the circum-

stance that rifles had been distributed by the Government to a number of the inhabitants to enable them to resist or to protect themselves against the Italians. Rifles were in these circumstances distributed to certain illaloes or native watchmen. In June 1941, one of the rifles so issued was missing, and it was thought to have come into the possession of a sub-tribe of the Dolbahanta known as the Adan Hagar, to whom also some rifles had been distributed. It was in the course of steps taken by a party of 22 illaloes to recover the missing rifle, which however had already been sent by the Adan Hagar to an illalo post at a village called Garrero, that an affray took place between the illaloes and the Adan Hagar resulting in the death of 11 of the illaloes. The two appellants were alleged to be in a party of the Adan Hagar consisting of about forty men armed with about 20 rifles and a light automatic. The trial took place in the month of February 1942, before Captain George Paterson, Legal Secretary, acting as Judge of the Protectorate Court, and three assessors who were Akils (members of a native Court). Nine persons had been charged, but one was too ill to be tried. The appellants belonged to the Adan Hagar sub-tribe. All the defendants pleaded not guilty, the appellant Mohamed Ibrahim relying on an alibi and calling two witnesses in support of it. Mr. Manilal, barrister-at-law was retained by the Government to defend the appellants (amongst others) at the trial and he conducted their defence. A number of witnesses were called. It seems desirable to state very shortly the somewhat unusual circumstances which were dealt with in the judgment of the learned Judge:

"In June 1941, a party of 22 illaloes from Garrero, Bohotleh and Tallabur were investigating the loss of an illalo rifle, and the death of one Iman Mohamed (Abdi Hersi) and for these purposes went to Harawati, where there were some Dolbahanta rer (sub-tribe) Adan Hagar karias. It appears that the missing rifle had come into the possession of the Adan Hagar who decided to send it to the Illalo post at Garrero. This was done and when the Adan Hagar heard that the illaloes were coming they sent a Dolbahanta Akil called Mohamed Abdi and an Elder called Farah Suleman to persuade them to go away. It seems that the illaloes did not believe that the rifle had been returned and they demanded another one as security, possibly because they suspected that this story might simply be a device to get them to return home empty-handed. Anyway, the two emissaries procured a rifle from the Adan Hagar which was handed over to the illaloes. The illaloes did not then leave the neighbourhood and a variety of reasons is suggested as to why they did not do so, the most likely being that as they had also come to investigate a murder they could not leave without finding out something about it.

On the day in question, Mohamed Abdi, sent to the Adan Hagar karias, as he said, to arrange for the supply of some milk to the illaloes, leaving them some distance away. Shortly after, he was followed

by Farah Suleman and two of the illalo corporals who were themselves members of the Dolbahanta tribe. They had seen three men returning to the karias and thought they might be the men who had returned the missing rifle to Garrero. The remaining sixteen illaloes then went to the Harawati balleh (rain pond) to have a drink and sit in the shade. Ten of them actually reached the balleh, the other six having stopped to urinate some 300 yards to the west of it. Just then a party of rer (sub-tribe or clan) Adan Hagar rer Ali Adan appeared singing. They came from the east and passed about 400 yards south of the balleh going west. Their numbers were variously estimated and it seems that they were about twenty or thirty strong, half of whom were armed with rifles.

According to the prosecution witnesses, this party suddenly saw the illaloes at the balleh, stopped and one of its members fired a round at them, followed by a volley. They say that very shortly after, the rer Ali Adan were reinforced by about forty men (armed with about twenty rifles and a light automatic) of the Adan Hagar rer Farah Adan who came from the karias to the west, and that the illaloes did not return the fire until after the arrival of the second party and one of their number had been hit. They defended themselves to the best of their ability but eventually they were completely surrounded by the Adan Hagar who killed eight of them including Cpl. Nur Musa by rifle fire and hand grenades. At this point the Adan Hagar had succeeded in filtrating between the two parties (of ten and six respectively) and the survivors rose up and fled. In the flight three men were killed including Abdi Badet. All the accused persons were alleged to be in the second party except Mohamed Ibrahim, who was supposed to have been in the first party."

The Judge at the conclusion of the trial addressed the three assessors. All three expressed the opinion that the appellant Mohamed Ibrahim was not present at the fight (accepting his alibi), one of them expressing the view that it was his brother who had been taken for him. All three assessors expressed the opinion that the appellant Galvos Hirad took part in the killing of Nur Musa. The Judge found both appellants guilty of murder under the provisions of Ss. 34 and 302, Penal Code, and sentenced them to death. They were then properly informed of their right to appeal and the time within which it was to be lodged. The other accused persons were acquitted.

The appellants duly appealed from the conviction and sentence to the Protectorate Court of Appeal of the Somaliland Protectorate. The Court of appeal had very wide powers amounting in effect to a re-hearing. Mr. Manilal was again instructed by the Government to appear as advocate for the appellants on the appeal, but, owing to difficulties which will be mentioned later, Mr. Manilal was not able to land in British Somaliland before 2nd July 1942, and the appeal was heard by the appellate Court which consisted of Major E. P. S. Shirley on 22nd June 1942, in the absence of counsel. The Appellate Judge heard the appellants in person and decided the appeal on a consideration of the record of the case, the judgment of

the trial Judge and the petition of appeal which had been submitted by Mr. Manilal. The Appellate Judge dismissed both appeals. The sentences of death were subject under the law to the confirmation of the Military Governor. The sentences of death were confirmed by Major E. P. S. Shirley (Acting Secretary to the Government) by command of the Military Government on 26th June 1942. Special leave to appeal against the judgment of the Protectorate Court of Appeal was granted by His Majesty in Council on 10th August 1943. The main ground of the appeal is that there has been no proper hearing of the case before the Protectorate Court of Appeal for the reason that the counsel assigned to the appellants was, in the circumstances to be next mentioned unable to appear at the hearing and to conduct the appeal. The Poor Persons Defence Ordinance No. 26 of 1939 provides as follows :

"Under S. 3 :

(1) Where it appears, for any reason, that it is desirable, in the interests of justice, that an accused person should have legal aid in the preparation and conduct of his defence at his trial and that his means are insufficient to enable him to obtain such aid —

(a) a certifying officer upon the committal of the accused person for trial; or

(b) a certifying officer at any time after reading the depositions recorded in any inquiry held under Chap. 16, Administration of Criminal Justice Ordinance into any of the offences specified in the schedule hereto; or

(c) a certifying officer upon the framing of a charge against a native on trial for an offence against S. 304, Penal Code, or an attempt at, or the abetment of such offence;

may certify that the accused person ought to have such legal aid, and if it is possible to procure an advocate, such accused person shall be entitled to have an advocate assigned to him.

(2) Any such accused person to whom an advocate has been assigned under the provisions of sub-s. (1) of this section, shall, if convicted at such trial, be entitled, on his lodging an appeal with the Protectorate Court of Appeal, to have an advocate assigned to him for the preparation and conduct of such appeal."

It appears that Mr. Manilal, who is a barrister-at-law enrolled to practise as an advocate of the Supreme Court of the Colony of Aden and permanently practising in that Colony, is the only person enrolled to practise in British Somaliland and has been in that position for some four years. He has to travel by sea from Aden to Somaliland when required by the British Somaliland Government to defend accused persons on trial on capital charges, and as stated he was retained by that Government to defend the appellants both in the trial Court and again on the appeal which he was told would take place on 22nd June 1942, at Hargeisa. The Government had been in the habit of asking the Movement Control

Office to arrange passages for Mr. Manilal when his presence as counsel was required, but owing to the war there was no shipping available between Aden and British Somaliland by which Mr. Manilal could arrive on 22nd June as instructed and, in fact, the authorities in British Somaliland, being well aware of the position, had written to him to make any other possible arrangements if there happened to be any chance shipping. The difficulty of the passage across the Gulf of Aden was well known and on some previous occasions the Protectorate Court of Sessions had adjourned a hearing in order that Mr. Manilal should have time to come to Somaliland. No steamship accommodation was in fact available for the journey so as to enable him to appear on 22nd June 1942, and it is not suggested that he could be expected to come by a native dhow or similar vessel at this time. However, the case was called on on 22nd June 1942. The Appeal Court Judge, so far as the note goes, made no enquiry with regard to the absence of Mr. Manilal or as to the date when he might be expected to arrive, but proceeded with the case. He heard some very short statements by the appellants and dismissed the appeals. In these circumstances it is contended on behalf of the appellants that there was a disregard of S. 3 (2), Poor Persons Defence Ordinance, and that the appeal has accordingly not been heard in accordance with the provisions applicable in the Protectorate and must be treated as not having taken place with the result that there was nothing which the Acting Secretary to the Government could validly confirm so far as the sentence of death was concerned.

It seems to their Lordships that the provisions as regards the right of a convicted person are not of a merely directory character. Sub-section (2) provides that poor persons in the position of the appellants having been convicted at the trial are entitled as of right on lodging an appeal to have an advocate assigned to them for the preparation and also for the conduct of such appeal. In the case of Somali natives who would probably be illiterate and therefore completely unable to make any criticism on the written judgment of the trial Judge even if they could read it, it is clear that the provision is of the utmost importance where the penalty is the death sentence. There does not seem to be any reason for a very technical construction to be given to the sub-section in question. The necessity for an assignment of counsel for the purpose of "conducting an appeal," seems to their Lordships to involve the necessity of seeing that it will be possible for the counsel to be present at the hearing. An appreciation was

called for of the difficulties which, in such a case as their Lordships have before them, might well make it impossible for counsel to cross 150 miles of sea by an adequate ship in time to be present on the date originally fixed for the hearing of the appeal. The assignment of counsel in the present case was made of no effect. These considerations seem not to have been present to the mind of the Judge sitting as the appeal Court and in the view of their Lordships the provisions of S. 3, Poor Persons Defence Ordinance, so far as regards the appeal have as a matter of substance been disregarded. They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable Mr. Manilal to attend and their Lordships are informed that he in fact arrived in British Somaliland on 2nd July 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal.

The importance of persons accused of a serious crime having the advantage of counsel to assist them before the Courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel: see Holdsworth History of English Law, Vol. 9, p. 226, *et. seq.* This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the Government who was unable, without any default on his part to reach the Court in time to conduct the appeal. The result is that the appeal to the Protectorate Court of Appeal which appears to have been properly lodged has not been effectively heard. The present appeal must therefore be allowed. Steps must be taken to restore the appeal for hearing either with Mr. Manilal or some other advocate properly assigned to the appellants under circumstances which will enable him to conduct the appeal. Their Lordships will humbly advise His Majesty accordingly.

G.N.

*Appeal allowed.*Solicitors for Appellants — *Hy. S. L. Polak & Co.*Solicitors for the King — *Burchells.***A. I. R. (31) 1944 Privy Council 96***(From Patna)*

29th June 1944

LORD THANKERTON, LORD WRIGHT AND
SIR MADHAVAN NAIR*Rai Bahadur Madhoram Sand and others*
— *Appellants*

v.

Raja Bahadur Kirtya Nand Sinha and
*others — Respondents.*Privy Council Appeal No. 25 of 1938; Patna
Appeal No. 8 of 1937.

(a) Transfer of Property Act (1882), S. 52 as it stood before amendment by Act 20 of 1929—Mortgage decree passed—Mortgage executed by mortgagor during course of execution proceedings — Doctrine of *lis pendens* applies.

A mortgage executed after a mortgage decree and during the course of the proceedings in execution of that decree is subject to *lis pendens*. Accordingly a mortgage executed by the mortgagor before the suit to which he was a party ended by sale of the mortgage property in execution of the mortgage decree passed in the suit is affected by the doctrine of *lis pendens*. [P 99 C 2]

(b) Transfer of Property Act (1882), S. 52, as it stood before amendment by Act 20 of 1929—Mortgage before amendment — Applicability of Section 52.

When the mortgage came into existence before the amendment of 1929 came into force, the doctrine of *lis pendens* applicable to the case is that enacted in S. 52 before it was amended by Act 20 of 1929. [P 99 C 1]

(c) Bihar Tenancy Act (8 of 1885), D Register—Entry as to jama paid in respect of property and entry of touzi number of property — Touzi number must be taken to be correctly describing property.

An entry as to the amount of jama cannot be held to indicate the property from which it is collected as it is conceivable that it might vary from time to time whereas the property recorded under a particular touzi number is specific and cannot vary. Accordingly where in a mortgage deed the touzi number of the mortgaged property is mentioned and the amount of jama payable is also mentioned the touzi number must be taken as correctly describing the property. [P 99 C 2; P 100 C 1]

(d) Transfer of Property Act (1882), S. 92, as amended by Act 20 of 1929—Subrogation claimed under S. 92, as amended or under pre-existing law — No subrogation if only part of money due under encumbrance is paid.

A person who claims the right of subrogation must pay the entire amount due under the encumbrance in respect of which subrogation is claimed. Payment of a portion only of the amount due under the encumbrance is not sufficient. Such a qualification of the right of subrogation applies whether the right is claimed under S. 92, as amended by Act 20 of 1929, or the pre-existing law : ('40) 27 A. I. R. 1940 P. C. 38, *Rel. on.* [P 100 C 1]

(e) Transfer of Property Act (1882), Ss. 92 and 100—Person claiming to be subrogated to rights of mere charge-holder, if can claim possession of property charged.

A charge-holder has merely a right to put the property charged to sale and cannot claim a right to possession and therefore a person who claims to be subrogated to the right of the charge-holder cannot claim possession of the property charged.

[P 100 C 1]

(f) Transfer of Property Act (1882), S. 52 as it stood before amendment by Act 20 of 1929—
— Mortgage suit held contentious and actively prosecuted within S. 52.

In 1905 *A* and *B* executed a simple mortgage of properties *x* and *y* in favour of *C* and in 1907 mortgaged property *x* to *D* and again in 1910 mortgaged properties *x* and *y* to *E*. In 1912 *C* brought a suit on his mortgage against the mortgagors impleading *E* but not *D*, the mortgagee under the bond of 1907. *C* obtained a preliminary decree on 17th December 1914 and a final decree on 17th August 1915. On 26th September 1921 *C* filed his execution petition and the properties were brought to sale on 23rd April 1923 and were purchased by *E*. During the pendency of *C*'s suit on 30th October 1912 and 20th June 1915 *A* executed two further mortgages of the properties *x* and *y* in favour of *R* who in 1916 brought two suits for sale on his two mortgages and purchased the properties on 7th February 1922 in execution of his decrees subject to the prior charges of *D* and *E*. On 18th September 1922 the mortgagors executed a usufructuary mortgage of properties *x* and *y* in favour of *R* under a compromise entered into between the mortgagors *A* and *B*, *D*, the mortgagee under the bond of 1907, *R* and *J* who held a charge on the properties *x* and *y* for her maintenance. It was argued that the usufructuary mortgage was not struck by *lis pendens* as *C*'s suit during the pendency of which it was executed was not contentious and was not actively prosecuted within the meaning of Section 52 :

Held that the proceedings in the case amply showed that the suit was contentious, that it was kept alive and that the proceedings in execution were carried on actively as might be judged from the various entries in the "order sheet." [P 99 C 2]

W. Wallach — for Appellants.

Sir T. Strangman and H. D. Cornish —
for Respondents.

Sir Madhavan Nair.—This is an appeal from a decree of the High Court of Judicature at Patna dated 19th March 1937, which affirmed granting additional relief to the plaintiffs (respondents before the Board) the decree dated 28th March 1933, passed in their favour by the Subordinate Judge of Purnea. The appeal is by defendants 1st party. The

plaintiffs-respondents claimed the suit property which consists of a 2 annas 8 pies share of a certain mahal bearing tauzi No. 1298 in the District of Purnea, as purchasers in execution of a mortgage decree. The facts are somewhat complicated, but are not in dispute and may be summarised as follows: The suit property was originally part of an estate known as the Srinagar Raj, and the lands in tauzi No. 1298 were originally in an estate which bore the No. 1273. The proprietors of the tauzi were three brothers, two of whom Kalikanand and Kamalanand, the sons of Rani Jagrama, held a two-third share of it jointly, while the third share was owned separately by their step-brother, Nityanand Singh. In 1894, the estate was partitioned by the collector under the Bengal Estates Partition Act. This resulted in the estate being split up into two tauzis, one of a two-third share—the property of Kalikanand and Kamalanand, bearing the old tauzi No. 1273, and the other of a third share, the property of Nityanand bearing a new number tauzi No. 1298. Rani Jagrama was given a maintenance of Rs. 1000 a month charged upon the entire property, the three brothers being bound to contribute equally to the payment of this allowance. Kalikanand and Kamalanand subsequently purchased the share of Nityanand. On 15th August 1905, Kalikanand and Kamalanand executed a simple mortgage for Rs. 1,000,00 of certain of their properties including the 2 annas 8 pies share of the estate bearing tauzi No. 1298 (the suit property in favour of one Ramsuram Prasad). The mortgagors are now represented by their descendants, defendants 6 to 13, referred to in the pleadings as defendants 2nd party. They are respondents 12 to 19 before the Board. On 13th November 1907, Kalikanand and Kamalanand executed in favour of the appellants a simple mortgage for Rs. 1,12,000 of their properties mentioned in the deed (Ex. A2) which included tauzi No. 1273. It was described in the deed as follows:

Tauzi No. 1273.	Name of Taluka	Paragna	District	Extent of share
Sadr-Jama. Rs. As. Ps. 7500 7 7	Tirakandah	Tirakandah	Purnea	16 annas.

The deed did not specify in the schedule tauzi No. 1298. One of the questions arising in the appeal is, whether this mortgage covered tauzi No. 1298. The Subordinate Judge held that it did, but the High Court held that it did not. The bearing of this question on the decision of the appeal will be explained later. On 29th April 1910, Kalikanand and Kamalanand executed a mortgage of tauzi Nos. 1273 and 1298 and other properties in favour of the plaintiffs-respondents for over Rs. 6 lakhs. On

16th September 1912, Ramsuram Prasad, the mortgagee under the bond of 1905 brought suit No. 546/1912 against the mortgagors impleading the plaintiffs-respondents as mortgagees under the abovementioned subsequent mortgage of 1910, but not impleading the appellants, the mortgagees, under the bond of 1907. He obtained a preliminary decree on 17th December 1914, and a final decree on 17th August 1915. On 26th September 1921, Ramsuram filed his execution petition, E. P.

No. 113/1921 and the properties were brought to sale on 23rd April 1921 (*sic* 1923). At the said sale the suit property was purchased by the plaintiffs-respondents. When they attempted to take possession of it, they were resisted by the appellants, and then, the suit out of which this appeal arises, was brought by them for possession of the same and for mesne profits.

Their Lordships will presently refer to the claim of the appellants to resist the plaintiffs-respondents, but to appreciate it, it is necessary that they should mention certain other events. During the pendency of suit No. 546/1912, on 30th October 1912, and 20th June 1915, Kalikanand Singh for himself and as karta of the joint family consisting of himself, his sons and nephews executed two further mortgages of properties including tauzi No. 1298 in favour of one Raja P. C. Lal Choudhary for Rs. 7 lakhs and Rs. 1,30,000 respectively. On 7th December 1916, he brought 2 suits for sale Nos. 765 and 766/1916 on those 2 mortgages; preliminary decrees were passed on 23rd January 1918, and final decrees on 8th April 1919. In 1920 T. S. No. 1097 was filed by certain members of the mortgagors' family to set aside the decrees obtained by the Raja, and while it was pending he executed his decrees (Execution Cases Nos. 78/79 of 1921) and purchased the properties on 7th February 1922, subject to the prior charges of the appellants on their mortgage of 1907, and subject also to the prior charge of the plaintiffs-respondents founded on their mortgage of 1910. It may be mentioned that some of the defendants filed objection cases, Nos. 26 to 29, to set aside the sales :

On 29th March 1920, Rani Jagrama filed Suit No. 225 for Rs. 1,61,194 for arrears of maintenance charged on the properties, joining as parties, her son Kalikanand and the representatives of Kamalanand (deceased), the present appellants, Raja P. C. Lal Choudhary and the plaintiffs-respondents. As the defendants 2nd party (defendants 6 to 13) now respondents 12 to 19, are the representatives of Kalikanand and Kamalanand the mortgagors, it will be noticed that all the parties to the present suit were included amongst the defendants in Suit No. 225/1920 brought by the Rani. Thus, at the time when Raja P. C. Lal purchased the properties in execution of his decrees, there were pending the Rani's suit, T. S. No. 1907 (*sic* 1097) brought to set aside the mortgage decrees obtained by him; and also Misc. Cases Nos. 26 to 29 brought to set aside the sales which he had obtained in execution of his decree. In the circumstances, the Rani, Raja P. C. Lal, the appellants, and the mortgagors compromised their disputes. The compromise was entered into on 17th

September 1922, and was embodied in a decree passed on 5th October 1923. The present plaintiffs-respondents who were also parties to the Rani's suit were not parties to the compromise. It is not explained why they were left out; however, not being parties to it, they will not be bound by its terms. At the time of the compromise it was found that a sum of Rs. 85,000 was due to the Rani for her maintenance. The terms of the compromise have been well summarised by the High Court as follows :

"Certain of the properties purchased by Raja P. C. Lal were released from all claims on behalf of the mortgagors and from all claims by Rani Jagrama. These are the items of property 47 in all contained in Sch. A of the compromise in the decree Ex. J (4). To discharge the balance of his claim under his mortgage, the properties set forth in Sch. D were conveyed to him by the mortgagors and Rani Jagrama also released these properties from any claim by her. He also received a handnote for Rs. 1,30,000 executed by the defendants first party on behalf of the defendants second party, and his decree was deemed to be satisfied and he released from his mortgage charge, in favour of the mortgagors, certain items of property including tauzis 1273 and 1298; the result being that he got Rs. 1,30,000 and a clear title to a considerable part of the property which he had purchased. The Rani released certain properties including tauzis 1273 and 1298 from her charge, in favour of the defendants first party and obtained a life tenure in respect of certain other properties and got 11 items set forth in Sch. B with an absolute title. Finally the defendants second party executed on 18th September 1922, a usufructuary mortgage in respect of the properties released in their favour including the two tauzis in question in favour of the defendants first party for Rs. 5,00,000, a part of which was made up by the handnote for Rs. 1,30,000 which was in effect borrowed from the defendants first party and the balance by the amounts due to defendants first party from defendants second party on the mortgage bond of 1907 and certain handnotes and a hundi after adjustment. As to the Rani's suit, the amount of Rs. 89,000 due on this was reduced in proportion to the property which she had released in favour of Raja P. C. Lal and the defendants first party and a decree was passed against the mortgagors and the other defendants for sums aggregating about Rs. 60,000."

In pursuance of the above compromise, on 18th September 1922, the mortgagors executed in favour of the appellants a usufructuary mortgage which included tauzi No. 1298 amongst other properties. In 1923, the plaintiffs-respondents sued the mortgagors on the mortgage bond of 1910, and obtained a preliminary decree on 18th September 1926. The appellants took possession of the suit property on the strength of the usufructuary mortgage dated 18th September 1922, as it included tauzi No. 1298 amongst other properties; and resisted the plaintiffs-respondents when they sought to take possession of it as purchasers in execution of the decree in suit No. 546/1912. The plaintiffs-respondents contended that the usufructuary mortgage could not affect their rights acquired during the pendency of suit

No. 546/1912 to which the mortgagors were parties; in other words, that the doctrine of *lis pendens* affected the mortgage and that the appellants derived no rights under it as against them. Amongst other matters, it was contended by the appellants that the principle of *lis pendens* could not be invoked by the plaintiffs-respondents in the circumstances of the case, that the usufructuary mortgage of 1922 was executed to pay off the mortgage of 1907 which included the suit property and that their right to redeem it on the strength of that mortgage was not affected by the decree in suit No. 546/1912 as they had not been made parties to it as subsequent mortgagees. It was also their contention, that they were subrogated to the charge which Rani Jagrama had over the suit property under the partition decree of 1894 and in consequence, their rights had priority over the mortgage of 5th August 1905. On the above contentions, the following questions arise for determination :

1. Is the usufructuary mortgage dated 18th September 1922, affected by the doctrine of *lis pendens* as alleged by the plaintiffs-respondents?

2. Are the appellants entitled to redeem the suit property as holders of the mortgage of 1907?

3. Are the appellants entitled to any right of subrogation?

The Courts in India decided all these questions in favour of the plaintiffs-respondents. The Subordinate Judge gave them a decree for possession of the property and for mesne profits from date of suit till recovery of possession; but he gave them no decree for mesne profits anterior to the institution of the suit. The appellants appealed from the decree, and the plaintiffs-respondents filed a memorandum of cross-objections. The High Court dismissed the appeal, and allowed the memorandum of objections. Their Lordships will now consider the questions in order :

It appears to their Lordships that the plea of *lis pendens* is well founded. The usufructuary mortgage in question was executed by the mortgagors who were parties to suit No. 546/1912 before it ended on 23rd April by the purchase of the suit property by the plaintiffs-respondents. It cannot therefore affect their rights; on the other hand, the mortgage bond is affected by the doctrine of *lis pendens*. The doctrine applicable to the case is that enacted in S. 52, T. P. Act (Act 4 of 1882) before it was amended by Act 20 of 1929, as the mortgage came into existence before the amendment came into force. The section limits the applicability of the doctrine so far as concerns the present appeal to purchases made during the "active prosecution"

in any Court of a "Contentious Suit or Proceeding." It was argued by Mr. Wallach that in this case it could not be said that there was a "Contentious Suit," nor could it be said that there was an "active prosecution" of the same. It is to the credit of the learned counsel that he did not appear to their Lordships to overstress the point as the proceedings in the case amply show that the suit was contentious, that it was kept alive and that the proceedings in execution were carried on actively as may be judged from the various entries in the "order sheet." A mortgage executed after a mortgage decree and during the course of execution proceedings is undoubtedly subject to *lis pendens*. No useful purpose will be served by discussing the words referred to by Mr. Wallach as the section has now been amended by substituting the word "pendency" for the words "active prosecution"; and the words "any Suit or Proceeding which is not Collusive" for the words "a Contentious Suit or Proceeding."

The next question relates to the right of the appellants to redeem the mortgage of 1907. The learned counsel argued that the effect of the usufructuary mortgage was merely that they were enabled to enforce their mortgage of 1907 without recourse to a suit and that their possession under the usufructuary mortgage was no more than possession under their earlier mortgage which was prior to the rights acquired by the plaintiffs-respondents under their purchase, and that they were not affected by the decree in suit No. 546/1912. It is clear that this plea cannot avail them unless their mortgage of 1907 covered tauzi No. 1298 on which point the High Court as already mentioned, differing from the Subordinate Judge, has found against them. The Subordinate Judge based his conclusion that tauzi No. 1298 is included in tauzi No. 1273 mentioned in the deed of 1907 mainly on the "Sadr-jama" (Revenue) of that tauzi given in the deed. It is not disputed that tauzi No. 1298 is not specifically mentioned in it. His reasoning may be given in his own words

"But the revenues of that tauzi and tauzi No. 1298 appearing from the D registers (Exs. L and L1) to be Rs. 4827-8-1 and Rs. 2413-12-0 respectively, their total comes up to Rs. 7241-4-1 which approaches the revenue of Rs. 7050-7-7 mentioned in the bond [Ex. A (2)] more nearly than the revenue of tauzi No. 1273 alone."

This reasoning was not accepted by the High Court for the reasons, that the number of the tauzi is 1273 which is specific, that the *sadr-jama* mentioned in the document itself Rs. 7500, does not correspond with the actual aggregate *sadr-jama* of tauzis Nos. 1273 and 1298 which is admitted to be Rs. 7241, and what is more important, that the amount of the *jama*

cannot be held to indicate the property from which it is collected as it is conceivable that it might vary from time to time, whereas the property recorded under a particular tauzi number cannot vary. With this reasoning of the High Court their Lordships desire to express their entire agreement. If the Tauzi No. 1298 is not included in the deed of 1907, then, no further question of the appellants' right to redeem the suit property based on that mortgage can arise. The last point raised relates to the right of subrogation claimed by the appellants. It will be remembered that the Rani had a charge over Tauzi No. 1298, and various other properties of the Raj under the partition decree of 1894. Their Lordships understand the appellants' contention to be that as at the time of the compromise they advanced Rs. 1,30,000, and as a result of that advance the Rani released the charge which she had over Tauzi No. 1298 and other properties; they are entitled to be subrogated to the rights of the Rani over the suit property. This contention was disallowed by the High Court on the ground that partial subrogation is not permissible in law. The reasoning of the learned Judges with which their Lordships agree is that it is impossible by analysing the terms of the compromise to find out what, if any, proportion of the advance of Rs. 1,30,000 is to be attributed to the release by the Rani of Tauzi No. 1298. They also added that

"The Rs. 1,30,000 advanced by the appellants to the mortgagors was really to pay off Raja P. C. Lal and the consideration for this loan was the usufructuary mortgage of 1922. In any event on the almost impossible supposition that the defendants first party are to be subrogated to Rani Jagrama's right, Rani Jagrama had merely a right to put the property charged to sale and could not claim a right to possession; so that the defendants first party cannot claim a right to possession as against the plaintiffs."

These observations are not without force. Partial subrogation is now disallowed by para. 4 of S. 92, T. P. Act. This section is new and was inserted by the amending Act 20 of 1929. After explaining the nature of "subrogation" in para. 3, para. 4 of the section states that :

"Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

In 67 I. A. 82¹ their Lordships approving the dictum of Mookerjee J. in 36 Cal. 193,² that "a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question,"

and "that payment of a portion only of the incumbrance is not sufficient," observed that

1. (40) 27 A.I.R. 1940 P. C. 38 : I. L. R. (1940) 1 Cal. 291 : 67 I. A. 82 : I.L.R. (1940) Kar. P. C. 82 (P. C.), Janaki Nath v. Pramatha Nath.

2. (07) 36 Cal. 193, Gurdeo Sing v. Chandrikah Singh.

"such a qualification of the right of subrogation applies whether the right is claimed under the statute or the pre-existing law."

The usufructuary mortgage in the present case which is of the year 1922 is covered by this decision. As the appellants have not been able to establish their claim to the suit property on any of the grounds urged by them the appeal fails and should be dismissed with the costs of the plaintiffs-respondents. Their Lordships will humbly advise His Majesty accordingly.

G.N.

Appeal dismissed.

Solicitors for Appellants—*Hy. S. L. Polak & Co.*

Solicitors for Respondents—*Douglas Grant & Dold.*

* A. I. R. (31) 1944 Privy Council 100

(*From N.W.F.P.*)

3rd July 1944

LORD THANKERTON, LORD JUSTICE
LUXMOORE AND SIR MADHAVAN NAIR

K. S. Agha Mir Ahmad Shah and another
— *Appellants*

v.

Mir Mudassir Shah and others —

Respondents.

Privy Council Appeal No. 20 of 1943.

* (a) Evidence — Death in common calamity (e. g., earth quake) of two individuals—No presumption that younger survived elder — It is question of fact — Burden of proof is on person who asserts affirmative.

When two individuals perish in a common calamity and the question arises as to who died first, in the absence of evidence on the point, there is no presumption in law that the younger survived the elder. Such a question is always from first to last a pure question of fact, the onus probandi lying on the party who asserts the affirmative. In a disaster like an earthquake, it is a matter of pure chance whether the younger or the elder would be killed first. It may well be that the younger might receive injuries which cause instantaneous death, while the elder might merely be buried under the debris and eventually die of suffocation : (1860) 8 H. L. C. 183, *Foll.*

[P 101 C 2; P 102 C 1]

(b) Civil P. C. (1908), O. 16, R. 14 — Power of Court to examine witness itself is discretionary.

The power of the Court under O. 16, R. 14 to examine witnesses on its own motion is discretionary. Where the Courts in India have for very good reasons refused to exercise their discretion, their Lordships of the Privy Council also would not exercise it.

[P 103 C 1, 2]

D. N. Pritt and R. K. Handoo—for Appellants.

J. M. Pringle — for Respondents.

Sir Madhavan Nair.—This is an appeal from the decree of the Court of Judicial Commissioner, North West Frontier, dated 13th June 1941, which affirmed the decree of the Senior Subordinate Judge, Peshawar, dated 23rd December 1938, by which a suit brought by the appellants against the respondents was dismissed. The appellants are the parents of

Lady Shamas Shah, who was the wife of a retired officer of the political service of the Government of India. The respondents are his nephews. Lady Shamas Shah and her husband lost their lives in the earthquake at Quetta, which occurred early in the morning of 31st May 1935. Sir Shamas Shah was 68 at the time of his death, and his wife 26. They had no children. At the time of the earthquake, Sir Shamas Shah, his wife, her younger sister, and one Mt. Faruq, a maid servant, were staying in his bungalow which collapsed in the earthquake. They were buried under the debris. Opposite their bungalow was the bungalow in which the appellants lived with their son Bashir Ahmmed and certain other persons. This bungalow also collapsed; but the appellants extricated themselves from the ruins; and accompanied by their son hurried across to the residence of Sir Shamas Shah to find out what had happened there. It is admitted that Sir Shamas Shah and his wife's sister were already dead when their bodies were recovered from the ruins. It is also admitted that Mt. Faruq survived the disaster: as to Lady Shamas Shah, the appellants set up the case that she was "taken out alive" when she was extracted at about the same time when her husband's body was recovered and that she thus survived him, though she expired immediately thereafter. The respondents denied that Lady Shamas Shah was "taken out alive" from the crumbled bungalow, and that she survived her husband. They contended that not having survived him, she did not inherit from him and the appellants had no title to the suit property on that ground. The parties are Mahomedans. As Sir Shamas Shah died without issue, assuming Lady Shamas to have survived him, his heirs on his death, under the Mahomedan law were, (1) his widow who became entitled to a fourth part of the estate and (2) his nephews, the present respondents, who took the remaining three-quarters.

On the death of Lady Shamas Shah, her parents, the present appellants, became entitled to the fourth part which she, their daughter, had inherited from her husband. If she did not survive her husband then, the respondents were entitled to the entire estate. The decision of the dispute thus depended upon the question "Did Lady Shamas Shah survive her husband," and on this basis, issue 4 was framed which was, "Did one-quarter of the property devolve on Lady Shamas Shah on the ground that she survived her husband?" The onus of proving the above issue was rightly thrown on the appellants who sought to discharge it (1) by adducing direct evidence of witnesses who said they saw that

Lady Shamas Shah was taken out alive from the debris, and (2) alternatively, in the event of the evidence as to her survival being found insufficient, by relying on what they alleged to be a presumption of law, that where two persons have died in circumstances rendering it uncertain which of them survived the other, the younger should be deemed to have survived the older, and consequently, that Lady Shamas Shah being younger of the two should be presumed to have survived her husband. The respondents also adduced evidence in support of their case.

The trial Court held that the evidence adduced by the appellants was not above suspicion, and that there is no presumption in law that in a common calamity the younger of the two deceased persons should be deemed to have survived the elder. In the result the suit was dismissed. It may be mentioned here that there was on record a statement that had been made by Mt. Faruq before a Commissioner, one Mrs. Quasim, who had been directed by the Court to take her evidence. That statement supports the version of the appellants regarding the survivorship of Lady Shamas Shah. It is obvious that the statement being that of the only inmate of the bungalow that survived the disaster would, if found true and acceptable, be of great value in the decision of the case, but it was excluded from consideration by the trial Judge owing to an infirmity that attached to it. He also refused to summon the said Mt. Faruq as a witness under O. 16, R. 14, Civil P. C., under which a Court in India may of its own motion summon as witnesses strangers to the suit, as he was of opinion that the appellants had inexcusably omitted to examine her. In appeal, the Judicial Commissioners agreed with the trial Judge on all the points urged before them including what was alleged as the wrongful exclusion of the evidence of Mt. Faruq. They also refused to remand the case for the examination of this witness. Eventually, the appeal was dismissed, as it was not proved that Lady Shamas Shah survived her husband.

In this appeal before the Board, it may be mentioned at the very outset, that Mr. Pritt, the learned counsel for the appellants, has rightly not relied on the so-called presumption in law regarding the survivorship of Lady Shamas Shah urged in the Courts below. It is clear to their Lordships that when two individuals perish in a common calamity and the question arises as to who died first, in the absence of evidence on the point, there is no presumption in law that the younger survived the elder. As was observed by the Lord Chancellor, Lord Campbell, in the leading English case on the subject, (1860) 8 H. L. C.

183¹: " Such a question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative." This rule has not been modified in India by any statute as has been done in England by S. 184, English Law of Property Act, 1925. The learned counsel, however, urged that though there is no presumption in law the survivorship of the younger should be considered as "an element in the evidence" bearing on the question as to who died first. As to this, their Lordships need only observe that the distinction which the learned counsel seeks to draw is very thin; it is obvious, that in a disaster like an earthquake, it is a matter of pure chance whether the younger or the elder would be killed first. It may well be that the younger might receive injuries which cause instantaneous death, while the elder might merely be buried under the debris and eventually die of suffocation.

The case presented before the Board appears to be one of concurrent findings of fact not involving any substantial question of law which according to the usual practice would necessarily entail its dismissal; but it was strongly urged by the learned counsel that the rule is not absolute and that there are exceptional circumstances in the case which, if attended to, would persuade their Lordships to hold that the findings should be re-opened. The main argument is that the statement of Mt. Faruq was wrongly excluded from consideration, and that the Board should in the interests of justice remand the case to India for fresh disposal after taking her evidence. To appreciate this argument, it is necessary that the circumstances which led to the exclusion of her statement should be examined. The material circumstances are these: A contemplated settlement of the case being found impossible, the Court appointed on 2nd December 1937, one Mrs. Quasim as Commissioner to take the evidence of the appellants' "female witnesses," appellant 2 and Mt. Faruq. In pursuance of that order Mrs. Quasim examined them both on 19th December. She appended the following note to the evidence:

"Pleader Said Ali Shah (pleader for respondents 1 and 4) had come to my compounder who informed him that the statement will be taken at 3 p. m. I waited for 15 minutes after which I took the ladies' statements. No pleader on either side appeared. Therefore no cross-examination. Plaintiffs' attorney present, Agha Chan Badshah."

In order, No. 11, dated 20th December 1937, the Court noted

"Counsel as before In view of the finding of the Court and request for change of date as pleaders were ill, she should have postponed recording the statements."

On 24th February 1938, in order, No. 13, the following order was passed:

"Parties and counsel as before. Plaintiff 1 absent again. Furnishes a medical certificate of being unable to attend. Counsel agree to the plaintiff being examined by open Commission. Issue Commission for K. S. Mir Ahmad Shah to Dr. Nur Ilahi pleader. For (2) to Dr. Miss Rishi"

The expression "For (2) to Dr. Miss Rishi" meant that plaintiff 2 was to be examined by Dr. Miss Rishi. She was accordingly examined on 27th March 1938. On 14th April 1938, after noting the names of the counsel for the plaintiff and defendant, the Court passed the following order:

"Two of P. W.'s of N.-W. F. P. will be produced in Court it is stated. Balance of P. W.'s statements will be recorded by Commissioner already appointed; also of D. W. S. to be taken by the same Commissioner."

Some more orders were passed respecting the examination of witnesses and the production of evidence. The appellants and respondents closed their cases on 25th August 1938, and 2nd November, respectively; and the case was posted to 7th December 1938, for arguments. On the above date the counsel for the appellants put in an application to the effect that the statement of Mt. Faruq should be recorded. On this, the Senior Subordinate Judge passed a long order which after referring to the relevant orders concluded as follows:

"Obviously the statement of Mt. Faruq recorded on 19th December 1938, cannot be admitted in evidence. This must have been obvious to the plaintiffs' counsel on 14th April 1938, and he should have then asked the Court for orders for the examination of this witness.

Counsel for the plaintiff pleads an unintentional omission and asks me to summon Mt. Faruq as a Court witness under O. 16, R. 14 as she is a vitally important witness. Counsel for defendants object on the ground that the evidence of both parties is closed. It is contended also that the omission was intentional on the part of the plaintiffs' counsel.

I have considered this question carefully and am of opinion that it would be seriously detrimental to the defendants' case to admit this witness at this stage. I do not consider that it is the duty of the Court to remedy an omission by a party to the suit which may be intentional or if not, must be due to neglect."

The following extract from the judgment of the Judicial Commissioners explains their reasons for not considering the statement of Mt. Faruq and for their refusal to remand the case for examining her:

"We are of opinion that the evidence of Mt. Faruq given before Mrs. Quasim cannot be taken into consideration; nor should the plaintiff be given a further opportunity of examining her. We cannot presume that the counsel for defendants 2 and 3 was notified in time so as to appear before Mrs. Quasim on 19th December. These defendants had no opportunity of cross-examining her. It is quite apparent that the plaintiffs were negligent in not having her examined later. Both she and plaintiff 2 had appeared before Mrs. Quasim. When the second com-

1. (1860) 8 H.L.C. 183, Wing v. Angrave.

mission was issued to Miss Rishi plaintiff 2 was examined but no attempt was made to get Mt. Faruq examined and counsel for the plaintiffs on two occasions gave statements which show clearly that all the evidence which was to be taken at Peshawar had been completed. We are not prepared to remand the case for the examination of this witness and we cannot take the evidence which she gave before Mrs. Quasim into consideration."

It appears to their Lordships that full and cogent reasons have been given by the learned Judges for rejecting the evidence of Mt. Faruq and for refusing to call her as a court witness. It is true that counsel for respondents 1 and 4 knew that the Commissioner would examine her on 19th December, but it is not a necessary inference from this that the counsel for respondents 2 and 3 who was a different individual had timely notice of the information. Indeed, it would be very dangerous to act upon the evidence of this witness as it had not been subjected to cross-examination. The Senior Subordinate Judge indicated his opinion to the parties at a very early stage that Mrs. Quasim should not have recorded the statement of Mt. Faruq on 19th December. In consequence, when Miss Rishi was appointed as Commissioner, appellant 2 who had already been examined on 19th December by Mrs. Quasim was examined afresh by the appellants, but not Mt. Faruq. The evidence of both these witnesses was subject to the same infirmity. No reasonable explanation for the omission to examine this witness before Miss Rishi has been offered. It may be that the appellants did not want her evidence at all, for reasons best known to themselves, or that they thought that she might be produced and examined in Court. Referring to his order passed on 14th April 1938, the Senior Subordinate Judge remarks :

"Orders were also passed for the examination of those of the witnesses who were residing outside N.-W. F. P. In this order no mention is made of Mt. Faruq who was residing in Peshawar City."

There is great force in the observation of the Judicial Commissioners that the appellants would seem to have abandoned the idea of producing Mt. Faruq in Court. On 25th August 1938, their counsel filed the statement that their case was closed, and the request that the statement of Mt. Faruq should be recorded was made on 7th December, when the case was taken up for argument, more than a month after the respondents had closed their case on 2nd November 1938. In the circumstances the Courts below were right in rejecting her evidence. It also appears to their Lordships that they were right in not acceding to the request of the appellants to examine Mt. Faruq, whether their omission to examine her was intentional or due to neglect. The power of the Court under O. 16, R. 14, Civil P. C., to examine witnesses on its own motion is discretionary. The Courts in India have in this case for very good reasons refused to exercise their discretion in favour of the appellants, and their Lordships also are not prepared to exercise it. No case has been made out for re-opening the concurrent finding of the Courts below that it has not been proved that Lady Shamas Shah survived her husband. In the circumstances their Lordships would accept the finding and humbly advise His Majesty that this appeal should be dismissed with costs.

R.K.

Appeal dismissed.

Solicitors for Appellants—*Hy. S. L. Polak & Co.*

Solicitors for Respondents —

Ranken Ford & Chester.

END

THE ALL INDIA REPORTER

1944

[Vol. 31]

FEDERAL COURT SECTION

WITH PARALLEL REFERENCES TO

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FEDERAL COURT OF INDIA
1944

CHIEF JUSTICE :

The Hon'ble Sir Patrick Spens, Kt., O.B.E.

PUISNE JUDGES :

The Hon'ble Sir Srinivasa Varadachariar, Kt., B.A., B.L., Rao Bahadur.
 " Dr. " Muhammad Zafrulla Khan, K.C.S.I., LL.D., Bar-at-law.

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CASE REVERSED

IN

A. I. R. (31) 1944 FEDERAL COURT

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=45 Cr. L. J. 333=31 A. I. R. 1944 Oudh 147
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THE
ALL INDIA REPORTER
1944
Federal Court

**** A. I. R. (31) 1944 Federal Court 1**

*(From : Patna, Nagpur, Allahabad
and Madras)*

1st December 1943

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Piare Dusadh and others — Appellants

v.

Emperor.

Criminal Appeals Nos. 35 to 47, 49 to 54 of 1943.

**** (a) Government of India Act (1935), S. 223 — Governor-General can constitute special Courts by proper Ordinance — Material provisions of Criminal Procedure Code can be excluded in trial of special cases.**

By a properly framed Ordinance the Governor-General can constitute special Courts, invest them with jurisdiction to try specified cases or classes of cases and prescribe the procedure to be followed by them in the trial of such cases even to the exclusion of material provisions of the Criminal Procedure Code. Whatever opinion might be held as to the expediency of curtailing the safeguards enacted by the Code to ensure a fair trial, no doubt can be cast upon the competence of the Ordinance-making authority to restrict or even remove any of these safeguards : (1885) 10 A. C. 675, *Rel. on.* [P 5b,c]

(b) Interpretation of statutes—Two constructions possible—One giving some effect should be preferred to other making enactment void.

When there are two possible constructions, one of which will make the enactment void and the other give it some effect the latter may have to be preferred, though it may not wholly achieve the purpose of the framers. [P 5h]

(c) Interpretation of statutes — Actual words are to be construed.

The question as to meaning of a section has to be determined by a consideration of the words actually used and not by speculation as to why other words had not been used. [P 6a]

1944 F.C./1 & 2

(d) Special Criminal Courts (Repeal) Ordinance (19 of 1943), S. 3 (1) — Purpose of S. 3 (1) explained.

The purpose of S. 3 (1) is to indicate not merely the forum but also the nature and extent of the relief to be had. "At a trial so held" in sub-s. (2) means, as set out in sub-s. (1), a trial held in accordance with the Code and by a Court having competent jurisdiction under the Code. As sub-s. (2) gives the right of appeal and the power of revision only on this hypothetical footing, the appellate or revisional authority cannot ignore this basic postulate and give relief on the very ground that the trial had not been held under the Code or before a Court exercising competent jurisdiction under the Code. [P 6f,g]

(e) Interpretation of statutes—Words clear—Questions of fairness or policy are not to be considered.

Questions of fairness or policy are not matters which the Court can take into consideration when the language of the enactment leaves little or no room for doubt. [P 7a]

(f) General Clauses Act (1897), S. 6 (e) — Repeal—Effect of, on pending cases.

On the principle embodied in S. 6 (e) the result of the repeal of an enactment on cases pending at the time of the repeal would be that they would continue as if the enactment had not been repealed. But this is subject to the qualification that the repealing enactment contains no provision or indication to the contrary. [P 7b,c]

(g) Special Criminal Courts (Repeal) Ordinance (19 of 1943), S. 3 (1) — Provision for conviction was not necessary.

Since S. 3 (1) requires the sentence to be treated as one passed by a competent Court at a proper trial, no separate provision referring to the "conviction" was necessary. [P 7d,e]

(h) Special Criminal Courts (Repeal) Ordinance (19 of 1943), S. 3—No attempt to exercise judicial functions.

What the Ordinance has attempted to do does not amount to an exercise of judicial power. [P 9c]

(i) Government of India Act (1935), Sch. 7—Power of validation is ancillary.

The power of validation must be taken to be ancillary or subsidiary to the power to deal with the particular subjects specified in the Lists: ('41) 28 A. I. R. 1941 F. C. 16, *Foll.* [P 10d]

(j) Government of India Act (1935), S. 100—Uniform law for all provinces — Single enactment can be passed.

If the Central authority can make laws for each of the Provinces, there is no principle in insisting that even when a uniform law has to be enacted for each of several Provinces, there can be no single enactment, but that there must be as many enactments as there are Provinces. [P 10f]

(k) Government of India Act (1935), S. 102—Internal disturbance.

The Central Legislature can encroach on provincial subjects not only in respect of matters necessitated by the war but also in respect of subjects relating to "internal disturbance." [P 10f,g]

**** (l) Special Criminal Courts (Repeal) Ordinance (19 of 1943), S. 3 (1)—S. 3 (1) is not ultra vires Governor-General.**

Section 3 (1) of Ordinance 19 of 1943 confers validity and full effectiveness on sentences passed by special Courts functioning under the Special Criminal Courts Ordinance, 2 of 1942, and this provision is not ultra vires the Governor-General: *Case law discussed.* [P 12a,b]

(m) Special Criminal Courts (Repeal) Ordinance (19 of 1943), S. 4—"Trial" includes imposition of sentence also.

Though the word "trial" may sometimes denote only the recording of evidence, in the context in which it occurs in Ordinance 19 of 1943 it must comprise all stages of the proceeding, including the imposition of the sentence: ('33) 20 A.I.R. 1933 Cal. 551 and ('38) 25 A. I. R. 1938 All. 102, *Ref.* [P 12e]

(n) Special Criminal Courts (Repeal) Ordinance (19 of 1943), S. 4—Review pending under S. 8 of Ordinance 2 of 1942—S. 4 applies.

In all cases falling under S. 8 (a) of Ordinance 2 of 1942 and in all cases where references had been made by the Special Judge under S. 8 (b) of the same Ordinance the accused will have to be tried under S. 4 of Ordinance 19 of 1943, unless the reviewing Judge, acting under the Special Criminal Courts Ordinance, had given his decision before the new Ordinance 19 of 1943 came into operation. The possibility that the High Court as a Court of appeal or acting as a confirming Court under Ch. 27, Criminal P. C., may consider or confirm the sentence will not suffice to bring this special class of cases under S. 3 (1) of the new Ordinance, or take them out of the operation of S. 4. But the High Court acting as such under the Criminal Procedure Code cannot be spoken of as a "special Court" within the meaning of the above provision. [P 12h; P 13a,b,d]

(o) Federal Court — Leave for grounds on merits granted — High Court's conclusions of facts are final unless High Court is shown to have misread or overlooked some evidence.

Where the High Court having dismissed the appeals of the convicts on the merits, the Federal Court grants leave for grounds on the merits of the cases to be raised, the Federal Court should ordinarily accept as final the conclusions of fact at which the High Court has arrived unless it can be shown that the High Court has either misread any part of the evidence or has overlooked any material portion of it. [P 13g,h]

(p) Federal Court — Death sentence—Inordinate delay in execution — Federal Court can substitute transportation — Jurisdiction should be exercised in special cases only.

The Federal Court has power, where there has been inordinate delay in executing death sentences in cases which come before it, to allow the appeal in so far as the death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. But this is a jurisdiction which very closely entrenches on the powers and duties of the Executive in regard to sentences imposed by Courts. It is a jurisdiction which any Court should be slow to exercise. [P 14a,b]

(q) Penal Code (1860), S. 302 — Jealousy or indignation disturbing balance of mind—Waiting also for over year for execution—Sentence reduced to transportation.

Where in committing the offence the accused must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind and he has also been awaiting the execution of his death sentence for over a year, a sentence of transportation for life would be more appropriate than the sentence of death. [P 14h]

(r) Special Criminal Courts Ordinance (2 of 1942), S. 6 — Statements that other witnesses corroborated or supported statements of prosecution witness or gave same story as prosecution witness is not memorandum of substance within S. 6—S. 6 is not complied with and prejudice is caused to accused in their defence.

Under the provisions of S. 6 of Ordinance 2 of 1942, the Special Judge was not bound to record the evidence of any witness verbatim, but he was bound to record a memorandum of the substance of the evidence of each witness examined. The statement that other witnesses corroborated or supported the statement of prosecution witness or gave the same story as prosecution witness with respect to certain incidents does not constitute a memorandum of the substance of the evidence given by those witnesses. The failure on the part of the Judge to comply with the provisions of S. 6 of Ordinance 2 of 1942 put the accused at a certain disadvantage and occasioned a certain amount of prejudice to them in the conduct of their defence. [P 18f,g]

[But it was held there was no failure of justice occasioned by such irregularity.]

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a Federal Court, (for K. K. Raizada, Advocate, Federal Court), instructed by Tarachand Brijmohanlal, Agent (in 47); S. Raghubir Singh, Advocate, Federal Court, instructed by Radhe Rawan Bhargava, Agent (in 53) and Harish Chandra, Senior Advocate, Federal Court, (R. K. Manohar, Advocate Federal Court, with him), instructed by Naunit Lal Chitkara, Agent (in 54) — for Appellants.

b Mahabir Prasad, Advocate-General of Bihar, (Yasin Yunus, Advocate, Federal Court, with him), instructed by S. P. Verma, Agent (in 35 to 42, and 50 to 52); Hidayat Ullah, Advocate, General of C. P. and Berar (Kaushalendra Rao, Advocate, Federal Court, with him), instructed by B. Banerji, Agent (in 43 to 46); Dr. Narain Prasad Asthana, Advocate-General of the United Provinces (Bajinath Sahai, Advocate, Federal Court, with him), instructed by Sumair Chand Jain Raizada, Agent (in 47, 53 and 54) and Sir Alladi Krishnaswami Ayyar, Advocate-General of Madras (N. Rajagopala Iyengar, Advocate, Federal Court, with him), instructed by Ganpat Rai, Agent (in 49) — for the Crown.

c Sir Brojendra Mitter, Advocate-General of India (H. K. Bose Advocate, Federal Court, with him), instructed by K. Y. Bhandarkar, Agent; Sir Alladi Krishnaswami Ayyar, Advocate-General of Madras (N. Rajagopala Iyengar, Advocate, Federal Court, with him), instructed by Ganpat Rai, Agent and N. P. Engineer, Advocate-General, Bombay (M. M. Desai, Advocate, Federal Court, with him), instructed by B. Banerji, Agent — Appeared in response to notices issued under O. 36, R. 1 of the Federal Court Rules, 1942.

d **Spens C. J.** — These appeals (from judgments of different High Courts) were heard together, as they raised common questions of law. The appellants had been convicted by Courts functioning under the Special Criminal Courts Ordinance (Ordinance 2 of 1942). On 4th June 1943, this Court (by a majority) held that the Courts constituted under that Ordinance had not been duly invested with jurisdiction, in view of the nature of the provisions contained in ss. 5, 10 and 16 of that Ordinance. The next day, the Governor-General made and promulgated another Ordinance, (Ordinance 19 of 1943) whereby Ordinance 2 of 1942 was repealed and certain provisions (to be referred to presently in detail) were made in respect of sentences which had been passed by the special Courts and in respect of cases which were pending before them on that date. By sub-s. (2) of s. 3 of the new Ordinance, a right of appeal against sentences which had already been passed by the special Courts was given and appeals were accordingly preferred to the High Court in some cases. In certain other cases, applications for a writ in the nature of habeas corpus were made. In both sets of cases, it was contended on behalf of the ac-

cused that the new Ordinance did not, and in any event could not, give validity to the sentences which had been passed by the special Courts, and it was claimed that the sentences should be treated as void or set aside without any examination of the merits of the case, and that the accused should, if necessary, be directed to be tried by the ordinary criminal Courts in due course of law. The various High Courts which had to deal with the cases that have now come up before us declined to accede to this contention, though in the Allahabad High Court one learned Judge (Bajpai J.) dissented. The habeas corpus applications were dismissed f and in some instances the appeals were also dismissed on the merits. In the cases from Nagpur, the High Court pronounced a preliminary judgment in the appeals, overruling the appellants' contentions on the points of law above referred to and gave a certificate under s. 205, Constitution Act, even before the appeals had been finally disposed of. It may be a question whether it is proper to entertain an appeal merely against the preliminary judgment. It may also be a question whether the validity of Ordinance 19 of 1943 can be challenged in an appeal preferred under and by virtue of the Ordinance itself. g Such objections were however not raised by counsel for the Crown and as the points of law had in any event to be decided in the habeas corpus cases, we permitted the questions of law to be argued on behalf of all the appellants. It may be mentioned that among the High Courts whose decisions are not directly now before us on appeal but which we have had to consider, the Bombay High Court upheld the validity of the Ordinance and placed on it the same interpretation as had been adopted by the High Courts at Allahabad, Madras, Nagpur and Patna. In the Calcutta High Court, two learned Judges h (Derbyshire C. J. and Khundkar J.) placed the narrower interpretation on the impugned provision of the Ordinance rather than hold it to be invalid; Sen J. held the Ordinance to be invalid.

It will be convenient to set out here the material provisions of the new Ordinance. Section 2 repealed the earlier Ordinance and s. 5 provided an indemnity for all officers, judicial or executive, in respect of what they had done under the repealed Ordinance. Section 4 provided that

"where the trial of any case pending before a Court constituted under the said Ordinance has not concluded before the date of the commencement of this Ordinance, the proceedings of such Court in the case

^a shall be void and the case shall be deemed to be transferred"

to the ordinary criminal Courts for enquiry or trial in accordance with the Code of Criminal Procedure. Section 3 is in the following terms :

^b "3. *Confirmation and continuance, subject to appeal, of sentences.*—(1) Any sentence passed by a Special Judge, a Special Magistrate or a Summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code.

(2) Notwithstanding anything contained in any other law, any such sentence as is referred to in sub-s. (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under S. 8, and whether or not the sentence was the subject of an appeal under S. 13 or S. 19, of the said Ordinance, be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance.

^c (3) Where any such sentence as aforesaid has been altered in the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the Court which passed the original sentence."

^d Two lines of argument have been advanced on behalf of the accused: first, it was said that on a reasonable construction of all the provisions of Ordinance 19, it could not have been intended to, and did not, in fact, give validity to the sentences passed by the special Courts, but only gave them a kind of provisional regularity of existence till they were brought before a Court of appeal or revision by whom they were expected to be immediately set aside on the ground that they had been passed without jurisdiction. Secondly, it was contended that if the Ordinance sought to give validity to those sentences, it was beyond the competence of the Governor-General to enact it. To appreciate and assess the force of these contentions, it is necessary briefly to advert to the provisions of Ordinance 2 of 1942 and to the precise terms of the judgment pronounced by this Court in relation to their operation. The Ordinance was promulgated under S. 72 of Sch. 9, Constitution Act which empowers the Governor-General "in cases of emergency" to make and promulgate Ordinances for the peace and good government of British India or any part thereof. The Ordinance accordingly recited that an emergency had arisen which made it necessary to provide for the setting up of special criminal Courts. Sub-

section (3) of S. 1, however, enacted that the Ordinance should come into force in any Province only if the Provincial Government (being satisfied of the existence of an emergency arising from a hostile attack, etc.), should by notification declare it to be in force in the Province. This way of framing the Ordinance gave rise to a contention that it had not been enacted in accordance with and in circumstances contemplated by S. 72. This point was left open in the previous judgment of this Court. The Ordinance proceeded to empower the Provincial Governments to constitute certain classes of special Courts, defined the classes of persons who could be appointed ^f to those Courts, specified the sentences which each of those Courts was authorised to impose, prescribed certain special rules of procedure for the conduct of trials before those Courts and to that extent excluded the application of the provisions of the Code of Criminal Procedure. It also made provision for appeals in certain classes of cases and a special provision for what is spoken of as "review" in certain other cases and completely excluded the jurisdiction of the High Court either as a Court of appeal or revision or as a Court exercising powers under S. 491 or S. 526, Criminal P. C. As the Courts created under the Code of ^g Criminal Procedure continued to function alongside of these special Courts, an attempt was made by ss. 5, 10 and 16 of the Ordinance to define the cases or classes of cases that should be tried by the special Courts under the Ordinance and not by the ordinary Courts in the ordinary way. It was enacted that they should try such offences or classes of offences or such cases or classes of cases as the Provincial Government or certain executive officers may, by general or special order in writing, direct.

^h The validity of Ordinance 2 of 1942 and the legality of sentences passed by Courts functioning under that Ordinance were questioned before all the High Courts and all but the Calcutta High Court held the Ordinance to be valid and the sentences to be legal. The Calcutta High Court however took a different view and directed the release of persons who had been sentenced by the special Courts subject of course to their liability to be tried before the ordinary Courts. It was on an appeal by the Crown against this judgment of the Calcutta High Court that the matter came before this Court in May-June 1943. This Court (by a majority judgment) held that so long as the Code of Criminal Procedure had not been repealed or validly and effectively excluded, a trial for any crime could only be

^a held by a Court constituted under the Code and in accordance with the procedure therein prescribed. It further held that it was only by a legislative provision that the Courts constituted under the Ordinance could be invested with jurisdiction to hold a criminal trial, and that ss. 5, 10 and 16 which left it entirely to the executive authorities to determine what cases should be tried by the regular Courts and by the special Courts respectively, were not valid legislative provisions and that they were accordingly inoperative either to divest the regular criminal Courts of their jurisdiction or to invest the special Courts with jurisdiction. It also pointed out that the powers of the High Court were only taken away by the executive orders under ss. 5, 10 and 16 and that this was not permissible in view of S. 223, Constitution Act. It was, however, expressly stated in that judgment that there could be no suggestion that the Ordinance was ultra vires the Governor-General on the ground that its subject-matter lay outside his Ordinance-making powers. There could be no doubt that by a properly framed Ordinance the Governor-General could have constituted special Courts, invested them with jurisdiction to try specified cases or classes of cases and prescribed the procedure to be followed by them in the trial of such cases even to the exclusion of material provisions of the Code of Criminal Procedure. Whatever opinion might be held as to the expediency of curtailing the safeguards enacted by the Code to ensure a fair trial, no doubt could be cast upon the competence of the Ordinance-making authority to restrict or even remove any of these safeguards : *see* (1885) 10 A. C. 675.¹

The arguments now urged before us on behalf of the appellants were based on two assumptions, (i) that Ordinance 19 of 1943 had been enacted on the admitted footing that Ordinance 2 of 1942 was void and inoperative and (ii) that the new Ordinance attempted to do something which this Court had held that the Ordinance-making authority had no power to do. Neither of these assumptions seems to us to be justified. The situation as it stood on 5th June 1943, was as follows: The Calcutta High Court and two Judges of this Court had held that ss. 5, 10 and 16 of the Ordinance were not the proper way of investing the special Courts with jurisdiction. All the other High Courts in India and one Judge of this Court had taken a different view and this Court had granted leave to the Government to take the matter on appeal to His Majesty

¹. (1885) 10 A. C. 675; 55 L. J. P. C. 28; 54 L. T. 339; 16 Cox. C. C. 48, *Riel v. The Queen*.

in Council. The Government had however to make immediate provision for the numerous cases which had before that date been decided by the special Courts in the various Provinces and in respect of the cases which were at the time pending before those Courts. It would have been scarcely reasonable to keep the whole position problematical till the matter could be decided by the Judicial Committee. It must have seemed equally unreasonable to ignore the judgment of this Court. A solution in the nature of a compromise between the two extreme positions seems to have been thought to be the best in the circumstances. As regards pending cases, the best that could be done in the light of this Court's judgment was to direct them to be tried by the regular Courts. It would no doubt have been possible to continue the special Courts by reframing ss. 5, 10 and 16; but this Court had also strongly commented on the provisions excluding the jurisdiction of the High Court. As regards cases where sentences had already been passed by the special Courts, it would have been a serious demand on public time, not to speak of public funds, to think of the retrial of all the accused who had been thus sentenced, as their number must have been very large. Nor could it be assumed that it would in all cases have been to the interest of the accused themselves to be retried, if they could in some other way be given an opportunity of showing that their conviction was not justified. In view of this Court's observations on the policy of excluding the High Court's jurisdiction, it was apparently felt that the best thing to do in the circumstances was to maintain the convictions, but to allow them to be questioned by way of appeal and revision as provided by the Code of Criminal Procedure. Whether it was competent to the Ordinance-making authority to make these provisions or not is not the question, when we have to interpret the provisions of the Ordinance. It may be that when there are two possible constructions, one of which will make the enactment void and the other give it some effect, the latter may have to be preferred, though it may not wholly achieve the purpose of the framers. But in the view that we take on the question of the validity of the Ordinance, no such difficulty arises in the present case. It is not right to assume that Ordinance 19 admitted that Ordinance 2 of 1942 was void. On that assumption, even its formal repeal would not have been necessary, further, it is not easy to reconcile the provisions of sub-ss. (1) and (2) of S. 3 with that assumption. Even S. 4, which declares pending trials before the special

a Courts void, does not necessarily import that the previous Ordinance was void, it only shows that Government preferred to have the pending cases tried by the regular Courts rather than hold them up till the question of the operativeness of Ordinance 2 of 1942 was decided by the Privy Council.

It was strongly insisted that sub-s. (1) of S. 3 did not use familiar words like "validation" or "confirmation," though the word "confirmation" is used in the heading. The question has however to be determined by a consideration of the words actually used and not by speculation as to why other words had not been used. It had to be admitted on behalf of the accused that some kind of operative-
 b ness had been given by S. 3 (1) to the sentences that had been passed by the special Courts, but it was said that this was only to the extent required to make proceedings by way of appeal or revision possible. And, as the formality of an appeal or revision need not have been insisted on if the Legislature had proceeded on the assumption that the sentences were void, it was suggested that it must have been the intention to leave it to the convicted persons either to acquiesce in the sentences or avail themselves of the opportunity given by the Ordinance to get the sentences set aside. It was explained that the cases dealt with under S. 3 (1) were not assimilated to those dealt with by S. 4, because an accused person who had already been convicted might in some cases prefer to undergo the sentence that had been imposed upon him rather than face a retrial which would be the result if the sentence had been declared void as one passed by a Court which had no jurisdiction. It was also said that having regard to the disabilities imposed on the accused at a trial by the special Courts, it would not be fair to assume that the Ordinance-making
 c authority intended to confirm sentences passed at such a trial or believed that adequate justice would be done to the accused in such cases merely by giving them a right of appeal or revision on the record as it stood. We are not satisfied that there is much force in these arguments. In our opinion, they do not give due effect to the language of sub-ss. (1) and (2) of section 3.

Sub-section (1) of S. 3 requires the sentence to be treated as if (1) "the trial at which it was passed had been held in accordance with the Code of Criminal Procedure," (2) by an officer "exercising competent jurisdiction under the said Code." It is obvious that these two groups of words were employed for the purpose of meeting the two requirements insisted

on by this Court in the previous judgment, namely, that so long as the Criminal Procedure Code had not been effectively excluded, the trial must be held in accordance with the Code and by Courts having jurisdiction under the Code. The suggestion that they might have been put in to indicate the forum for the appeal or to indicate the classes of cases where remedies should be sought by appeal and revision respectively is unconvincing. The purpose would have been achieved even by the remaining words found in the section, namely, as if "they had been passed by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the First Class respectively." That the purpose of this section was to indicate not merely the forum but also the nature and extent of the relief to be had is made clear by sub-s. (2) which subjects the sentence "to such rights of appeal as would have accrued and to such powers of revision as would have been exercisable under the Code" and then repeats the words "if the sentence had at a trial so held been passed." "At a trial so held" obviously means, as set out in sub-s. (1), a trial held in accordance with the Code and by a Court having competent jurisdiction under the Code. As sub-s. (2) gives the right of appeal and the power of revision only on this hypothetical footing, the appellate or revisional authority cannot ignore this basic postulate and give relief on the very ground that the trial had not been held under the Code or before a Court exercising competent jurisdiction under the Code. If S. 3 (1) gives any validity at all to the sentences that had been passed by the special Courts, there is nothing to limit such validity up to the time that the sentences are appealed against. As for the argument based on the improbability of an intention to confirm sentences passed at trials which were characterised as unfair to the accused, it seems to
 e us incorrect to assume that the authority which enacted Ordinance 19 would have thought that the procedure prescribed by itself in Ordinance 2 of 1942 was not in the circumstances sufficiently fair to the accused. It might well have thought that any hardship even on this score would be remedied by allowing the right of appeal or revision. It was only reasonable to expect that if the appellate or revisional authority found reason to think on going into the merits that the accused had been prejudiced by the nature of the trial, it would set things right. But this is different from saying that the appellate or revisional authority should automatically set aside the sentence merely on the ground that the accused
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a had not been tried in accordance with the Code. It has been suggested that the right of appeal would in the circumstances be illusory. We are by no means satisfied that that would be so. We see no justification for importing a fictitious or notional "trial by jury" and on that assumption limiting the powers of the appellate Court. Even this possible doubt has been removed by Ordinance 32 of 1943, which allows a right of appeal both on questions of fact and on questions of law. In any event, questions of fairness or policy are not matters which the Court can take into consideration when the language of the enactment leaves b little or no room for doubt.

It has been further contended that as S. 4 proceeds on the footing that the trials before the special Courts were void, consistency requires that S. 3 also must be interpreted on the same assumption. It was even said that any other view would make the provisions of the Ordinance illogical and self-contradictory. It is difficult to follow this argument. It seems to us that on this basis there would have been no need to make separate provisions for the two classes of cases respectively dealt with by Ss. 3 and 4. Even S. 4 cannot be said to have proceeded on the assumption that the trials c before the special Courts were void. On the principle embodied in S. 6 (e), General Clauses Act, the result of the repeal of an enactment on cases pending at the time of the repeal would be that they would continue as if the enactment had not been repealed. But this is subject to the qualification that the repealing enactment contains no provision or indication to the contrary. It was open to the Government to insist that in spite of the decision of this Court on the last occasion, cases pending before the special Courts at the time should continue to be tried before them, in the expectation that the Judicial Committee might d take a different view as to the operation of Ordinance 2 of 1942. This would have been the position even after the repeal, if the matter had been allowed to rest upon S. 6 (e), General Clauses Act. But apparently as the Government were not prepared to adopt that attitude, they have enacted S. 4 in its present terms. As already explained, there is sufficient reason for making a distinction between cases dealt with by S. 3 and cases dealt with by S. 4 and there is no illogicality or contradiction involved in such distinction. A point has been made that S. 3 (1) seeks to give validity only to the sentence and not to the conviction. Nothing turns on this, because the section requires the sentence to be treated as one passed by a competent Court at a proper trial. On this footing

no separate provision referring to the "convic- e tion" was necessary.

In arguing the question as to the validity of the Ordinance, counsel for the accused recognised that the principle of validation by subsequent legislation was quite as applicable to judicial as to ministerial proceedings. This is expressly so stated in the very passage on which they relied from Cooley's "Constitutional Limitations" Edn. 8, p. 205 (see also pp. 773-776). They laid stress on the author's statement as to the limitations on that power and contended (1) that the Ordinance had sought to give validity to what the Ordinance-making authority could not have authorised f even by antecedent legislation; (2) that while such legislation might seek to aid and support judicial proceedings, the Legislature could not under the guise of legislation be permitted to exercise judicial power, and (3) that it was not competent to the Legislature by retrospective legislation to make valid any proceedings which had been held in the Courts, but which were void for want of jurisdiction over the parties. The first of these limitations is without doubt recognised in the English law: see per Willes J. in (1870) 6 Q. B. 1² at p. 17. In support of limitations (2) and (3), Cooley g cites the decisions in 19 ILL. 226³ and 2 ALLEN. 361:⁴ see also 19 Am. Rep. 656.⁵

The argument with reference to the first limitation was based on the assumption that Ordinance 19 sought to validate the very delegation of power to the executive which was attempted by Ss. 5, 10 and 16 of Ordinance 2 of 1942 and which, it was held by this Court in the previous case, could not be validly done. This assumption is, in our opinion, unwarranted. The expression "what could have been antecedently authorised" implies that this had not as a matter of fact been done previously. In the circumstances of this case h that could not be said of the delegation of power to the executive authorities, because that had, in fact, been done by Ss. 5, 10 and 16 of the previous Ordinance. It is the acts of the special Courts in trying cases and passing sentences as they had done that had not in fact been duly authorised on the previous occasion and it is those acts that are now sought to be declared valid. The enquiry under this head must therefore be whether the Ordinance-making authority had power (if only it had properly exercised such power)

2. (1870) 6 Q. B. 1 : 10 B. & S. 1004 : 40 L.J. Q.B. 28 : 22 L. T. 869, *Eyre v. Phillips*.

3. 19 Ill. 226, *McDaniel v. Correll*.

4. 2 Allen 361, *Denny v. Mattoon*.

5. 19 Am. Rep. 656, *Pryor v. Downey*.

a to create these special Courts and authorise them to try cases and pass sentences. On the existence of such power no doubt was cast by this Court on the previous occasion and it has not been denied even by counsel for the accused in these cases. There is accordingly no substance in this objection. In this view, no question arises of the legislating authority attempting to do indirectly what it could not do directly. We were in this connexion invited to express a definite opinion on the point which we had left open in (1943) 6 F. L. J. F. C. 79⁶ viz., whether Ordinance 2 of 1942 was promulgated on a declaration of emergency of the kind contemplated by S. 72 of Sch. 9. We do not see that it would make any difference to the decision of the present question even if Ordinance 2 of 1942 should be held to have been inoperative on that ground; that would not imply the absence of power in the Governor-General, but would only involve the conclusion that the power had not been properly exercised on the previous occasion.

Turning to the other two objections referred to above, it is necessary to consider how far they rest upon peculiarities of the American Constitution. As a general proposition, it may be true enough to say that the legislative function belongs to the Legislature and the judicial function to the judiciary. Such differentiation of functions and distribution of powers are in a sense part of the Indian law as of the American law. But an examination of the American authorities will show that the development of the results of this distribution in America has been influenced not merely by the simple fact of the distribution of functions, but by the assumption that the constitution was intended to reproduce the provision that had already existed in many of the State Constitutions, positively forbidding the legislature from exercising judicial powers: [see paras. 520 et seq in Story's "Commentary on the Constitution of the United States"]. The reasons contained in the passages cited from the "Federalist" in paras. 1585, etc., of Story and the quotation from Mr. Tucker in the foot-note to para. 1637 will explain the development of the American rule. In one case, it was observed:

"It is a fundamental principle that every person restrained of his liberty is entitled to have the cause of such restraint enquired into by a judicial officer. The judicial department of the Government cannot by any legislation be deprived of this power or re-

lieved of this duty." [103 Am. St. Rep. 944,⁷ quoted in the foot-note on page 185 in Cooley's "Constitutional Limitations"].

This view is partly based on considerations which will be discussed when dealing more specifically with the third objection. One result of the application of this rule in the United States has been to hold that

"legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Courts in the exercise of their undoubted authority have made."

The reason given is that

"this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a Court of review to which parties might appeal when dissatisfied with the rulings of the Courts." [See Cooley's "Constitutional Limitations," page 190].

In India, however, the legislature has more than once enacted laws providing that suits which had been dismissed on a particular view of the law must be restored and retried. Two well-known instances are S. 31 (2), Limitation Act, 1908, which provided for the restoration of suits dismissed on the ground that the 12 years' period of limitation under Article 132, Limitation Act, applied to suits for sale by holders of simple mortgages and the Public Suits Validation Act (11 of 1932) which provided for the restoration of suits dismissed on a particular interpretation of S. 93, Civil P. C. Again, debt relief legislation in the various provinces has provided even for the reopening of decrees passed inter partes. In view of the history of the rule in America, it is questionable whether it would be right to apply the same rule in this country. Further, the American authorities themselves show that, even in the United States, limitations had to be placed on the strict American rule and that it was not found possible to differentiate by a clear-cut definition the exercise of legislative power from the exercise of judicial power. [See Will's "Constitutional Law of the United States," p. 142].

An Australian case (1931) 38 Com. L. R. 153,⁸ to which we were referred by the Advocate-General of India, bears some resemblance to the present case. An Act of 1922 had constituted a Board of Appeal to deal with appeals in income-tax matters and this Board had given certain decisions. But the law Courts declared that the Australian Parliament had no power to invest this Board of Appeal with judicial power. A later Act established what was described as a Board of Re-

6. (1943) 30 A. I. R. 1943 F. C. 36 : 208 I. C. 564 : I. L. R. (1943) Kar. F. C. 48 : (1943) 6 F. L. J. F. C. 79 (F. C.), Emperor v. Benoari Lal Sarma.

7. 103 Am. St. Rep. 944, In re Boyett.

8. (1931) 38 Com. L. R. 153, Federal Commissioner of Taxation v. Munro.

a view and assigned to it functions which were held to be different in character from those assigned to the former Board of Appeal. It, however, went on to provide that decisions which had already been pronounced by the Board of Appeal "should be deemed to be and at all times to have been decisions of a Board of Review given in pursuance of the provisions of the later Act." The later Act was also challenged as vesting judicial power in the Board of Review, but this contention was overruled. The validating provision in the later Act was next challenged as constituting "an attempt by Parliament itself to exercise b the judicial power of the Commonwealth." The answer to this argument is relevant here. One learned Judge (Isaacs J.) interpreted this provision as implying a "retrospective creation" of the Board of Review and placing the decisions of the old Board of Appeal on the same footing as they would be on if the now existing Board of Review had then pronounced them (pp. 173, 174). Another learned Judge (Starke J.) observed :

"Parliament simply takes up certain determinations which exist in fact, though made without authority, and prescribes not that they shall be acts done by a Board of Review, but that they shall be treated as they would be treated if they were such c acts. The sections, no doubt, apply retrospectively, but they do not constitute an exercise of the judicial power on the part of the Parliament" (p. 212).

We think that this latter description is apposite to what happened in the present case and also answers the argument that it is an impossible feat to convert what was not a trial under the Code of Criminal Procedure into a trial under the Code.

Judged by any reasonable test, it seems to us difficult to hold that what the Ordinance has attempted to do in this case amounts to an exercise of judicial power. A passing reference was made in this connexion to S. 71 (3), d Constitution Act, which precludes the legislative chambers from conferring on themselves "the status of a Court." This and the similar provision in S. 28 (3) have no bearing upon the present question. They were intended to set at rest the question whether these legislative bodies had the power to punish for contempt. (Cf. (1866) L.R. 1 P.C. 328,⁹ (1886) 11 A.C. 197¹⁰ and (1896) A.C. 600.¹¹) Section 313 (1) which was also relied on in this connexion relates to the "executive" authority of the Governor-General

in Council and not to the "law-making" e capacity of the Governor-General. It was contended that once the decisions of the special Courts were held void for want of jurisdiction, the position in the present case would be nothing different from a sentence imposed by the Legislature directly on each of the accused in all the cases that had been before the special Courts. This does not seem to us to be a fair or correct view of the position. The Legislature has not attempted to decide the question of the guilt or innocence of any of the accused. That question had as a matter of fact been decided by tribunals which were directed to follow a certain judicial procedure. f The effect of the absence of jurisdiction in these tribunals falls to be considered when dealing with the third objection. For the present purpose, however, we see no justification for importing a fiction that there had in fact been no judicial trial and that it is the legislation that declares the guilt of the accused in all the cases and imposes sentences upon them. It must be remembered that even under the Ordinance, the sentences are in due course subject to appeal to and revision by the regular Courts of the land.

In dealing with the third objection, it is g again necessary to examine the basis of the Amercian rule in order to determine whether it can be followed here. It is clear from the Amercian authorities that this limitation has been derived from the interpretation placed by the American Courts on what are known as the Fifth and Fourteenth Amendments which provide against any person being "deprived of life, liberty or property without due process of law." The expression "due process of law" has been interpreted as referring only to "judicial process" and as not including legislation, and "judicial process" was held to imply competence or jurisdiction h in the Court and an opportunity for a hearing. As this requirement had been made part of the written constitution, it followed that no enactment passed by a Legislature limited by that constitution could authorize anything in violation of it. [See Willoughby's "Constitution of the United States," paras. 1115 to 1117, 1122 and 1123]. Hence the rule (stated by Cooley) that

"it would be incompetent for the Legislature, by retrospective legislation, to make valid any proceedings which had been had in the Courts but which were void for want of jurisdiction over the parties."

The constitutional position in India is different. Comparing the American Amendments with the provisions of the Constitution Act, 1935, it will be seen that the latter con-

9. (1866) L. R. 1 P. C. 328 : 36 L. J. P. C. 34 : 4 Moore P. C. (N. S.) 203 : 15 W. R. 366, Doyle v. Falconer.

10. (1886) 11 A.C. 197 : 55 L. J. P. C. 1 : 55 L.T. 158, Barton v. Taylor.

11. (1896) 1896 A. C. 600 : 65 L. J. P. C. 103 : 75 L. T. 216, Fielding v. Thomas.

a tains nothing corresponding to so much of the Amendments as related to deprivation of "life or liberty" and that even as to "property" it only requires that such deprivation should be "by authority of law" : *see* S. 299. This does not of course mean that the well-established principle of British jurisprudence as to the sacredness of personal freedom is not part of the law of British India. But as pointed out by Dicey, the rule remains only as a principle of "private law" and is not a part of the Constitution : [*See* Dicey's "Law of the Constitution," Edn. 9, p. 203 and Wade and Phillips, "Constitutional Law," Edn. 2, p. 354]. While its
b enactment as an article of the Constitution would have placed it beyond the power of the Indian Legislature to alter it, the position must be different so long as it remains a rule of private law, however cardinal and fundamental : [*See* Dicey, p. 200, foot-note]. The principle of the English law as to personal liberty was stated by Lord Atkin in (1931) A. C. 662¹² in the following terms :

"In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice."

Comparing the language of the American
c Amendments with this statement of the English rule, it will be noticed that what is required under the English rule is not "due process of law," but "legal justification" and such justification may be shown as much by legislation or statutory rules as by production of an order of Court : *see* (1917) A. C. 260.¹³ It does not however follow that Legislatures in India can arbitrarily interfere with the life or the liberty of the citizen, because they have only such powers as have been conferred on them by Sch. 7, Constitution Act.

The real question in the present case there-
d fore is whether the Ordinance is covered by any of the entries in Sch. 7, Constitution Act. It was not contended that the mere absence of a specific provision about "validating laws" was by itself of much significance. As observed by this Court in 1940 F. C. R. 110¹⁴ at p. 136 the power of validation must be taken to be ancillary or subsidiary to the power to deal with the particular subjects specified in the Lists. No question arises in this case as to

the distribution of the subjects between the
Provincial Legislature and the Central Legis-
lature, because a declaration of emergency
under S. 102, Constitution Act, has been pro-
claimed. It was contended that under the
terms of S. 102 (1) the Legislature could make
laws only "for a Province," that is, separately
for each Province and not for a number of
Provinces together. There is no basis for this
contention. Under the Interpretation Act,
the use of the singular number will, in the
absence of any indication to the contrary in
the context or the nature of the subject, include
the plural; the clause has apparently been
worded in that particular form, because it has
f been enacted as an exception to S. 100 (3)
which excludes the power of the Federal
Legislature "to make laws for a Province" in
certain cases. If the Central authority can
make laws for each of the Provinces, there is
no principle in insisting that even when a
uniform law has to be enacted for each of
several Provinces, there can be no single
enactment, but that there must be as many
enactments as there are Provinces. It was
further contended that where, as in this case,
a proclamation of emergency under S. 102
referred only to a threat "by war," the Central
Legislature could encroach on provincial sub-
g jects only in respect of matters necessitated
by the war and not in respect of subjects
relating to "internal disturbance." The words
of the section do not justify any such limita-
tion. As regards authorization by the Lists in
Sch. 7, it seems to us sufficient to say that the
subject-matter of the present Ordinance is in
our judgment covered by the expression
"administration of justice" in entry No. 1 of
List II and the expression "criminal procedure"
in entry No. 2 of List III.

On behalf of the Crown, strong reliance
was placed on the decision of the Judicial
Committee in (1907) A. C. 93¹⁵ and of the
h High Courts in India in 55 Bom. 263¹⁶ and
60 Cal. 742¹⁷ and as much controversy raged
round them we feel we should refer to them
shortly. The decision in 1907 A. C. 93¹⁵ is on
the face of it, a strong authority in support
of the contention advanced on behalf of the
Crown. Their Lordships were dealing with an
Act passed by the Natal Parliament which
provided that

12. ('31) 18 A.I.R. 1931 P. C. 248 : 132 I. C. 739 : 1931 A. C. 662 : 100 L.J.P.C. 152 : 145 L. T. 297, *Eshugbayi Eleko v. Nigeria Administration*.

13. (1917) 1917 A. C. 260 : 86 L. J. K. B. 1119 : 116 L. T. 417 : 81 J. P. 237 : 25 Cox C. C. 650 : 33 T. L. R. 336 : 61 S. J. 443, *Rex v. Halliday*.

14. ('41) 28 A.I.R. 1941 F. C. 16 : 192 I. C. 138 : 1940 F. C. R. 110 : I. L. R. (1941) Kar F. C. 72 (F. C.), *United Provinces v. Mt. Atiqa Begum*.

15. (1907) 1907 A.C. 93 : 76 L.J.P.C. 29 : 95 L.T. 853 : 23 T.L.R. 21, *Tilonko v. Attorney-General of Natal*.

16. ('31) 18 A.I.R. 1931 Bom. 57 : 129 I. C. 596 : 55 Bom. 263 (S. B.), *Emperor v. Chanappa*.

17. ('33) 20 A.I.R. 1933 Cal. 280 : 142 I. C. 204 : 34 Cr. L. J. 291 : 60 Cal. 742 : 37 C. W. N. 363, *Jogendrachandra Ray v. Superintendent, Dum Dum Special Jail*.

a "all sentences passed by any person administering martial law are hereby confirmed and made and declared to be lawful and shall be deemed to be final sentences passed by duly and legally constituted Courts of this Colony."

It is no doubt true that the matter was then before their Lordships on an application for special leave and it might have been sufficient answer to the application to say that the decision of a martial law authority was not that of a judicial tribunal at all and could not therefore be brought up before their Lordships. But their Lordships nevertheless proceeded to give other reasons in support of their dismissal of the application. The sentences in the judgment which have been particularly relied on by counsel for the Crown run as follows:

"An Act of Parliament has been passed in Natal which in terms enacts the legality of the sentences in question and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction. This board has no power to review these sentences or to enquire into the propriety or impropriety of passing such an Act of Parliament The Act has been assented to by the Governor and having the force of law, is binding on their Lordships."

We have been asked to treat this as a complete answer to two of the contentions advanced on behalf of the appellants, namely, that legislation conferring validity on sentences passed by an authority which had no jurisdiction in law is not permissible and that such legislation is in the nature of the exercise of judicial authority. On behalf of the appellants, two grounds of distinction (mentioned in the judgment of Bajpai J.) were relied on. It was said (on the strength of an observation of Mr. Brand in his book on the Union of South Africa referred to by Bajpai J.) that under the South African Constitution, the Parliament was supreme and that even in Natal, as in Great Britain, the Courts had no authority to act as interpreters of the Constitution. This was answered by counsel for the Crown by pointing out that whatever might be the position in South Africa after the Statute of Westminster and after certain South African legislation of 1934, the position in 1906, when the Natal legislation considered by their Lordships was passed, was nothing different from that of any other Crown Colony, as the Natal Charter of 1856 only contained the usual clause authorizing legislation for the peace and good government of the Colony. That the same continued to be the legal position even after the Union of South Africa Act till the enactment of the Statute of Westminster was shown by comparing the decision in 1930 South African L. R. App. Div. 484¹⁸

18. (1930) 1930 South African L. R. App. Div. 484, *Rex. v. Ndobe.*

with that in 1937 South African L. R. App. Div. 229.¹⁹ It was next urged by counsel for the appellants that this decision had been treated by certain writers on Constitutional Law only as an authority for the proposition that an English Court could not enter into the propriety as opposed to the legal validity of a colonial statute (Chalmers and Asquith "Outlines of Constitutional Law," 3rd Edn., p. 203 and Ridges' "Constitution Law of England," 6th Edn., p. 491) and they asked us to infer therefrom that the question of the validity of the statute had apparently not been argued before their Lordships. On behalf of the Crown, attention was drawn to the report in (1906) 22 T. L. R. 413,²⁰ where the history of the proceedings of the martial law tribunal in Natal has been set out and the arguments at the Bar at that stage have also been more fully stated and we were asked to say that the same learned counsel who appeared for the petitioner in 1907 A. C. 93¹⁵ could not have omitted to raise the question of validity. Lastly, it was contended that a martial law tribunal was more analogous to an executive authority than to a judicial authority and that the decision was no authority for the contention that a void judgment of a judicial tribunal could be validated by subsequent legislation. Their Lordships' observation is very general and it seems rather difficult to restrict its effect in the way that counsel for the appellants asked us to do.

The decision in 55 Bom. 263¹⁶ is no doubt an authority in favour of the Crown in so far as it held s. 11 of the Ordinance then in question to be valid, but there is little discussion of the point there. In 60 Cal. 742¹⁷ the Court had not to consider the questions arising in the present case. 1920 A. C. 230²¹ which was also cited before us, throws little light on the questions arising here. Their Lordships had not to deal with a question of validation but only with a limited plea of ultra vires based on the exception to s. 93 (1), British North America Act, to the effect that the law should not

"prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union."

Two other grounds of invalidation were suggested, though but faintly. It was said

19. (1937) 1937 South African L. R. App. Div. 229, *Ndlwana v. Hofmeyr.*

20. (1906) 22 T. L. R. 413; 94 L. T. 558; 21 Cox. C. C. 154, *Ex parte Mgomini.*

21. (19) 6 A. I. R. 1919 P. C. 96; 1920 A. C. 230; 89 L. J. P. C. 9; 122 L. T. 211; 36 T. L. R. 23, *Trustees of the Ottawa Roman Catholic Schools v. The Quebec Bank.*

a that the provisions of the Ordinance were hardly likely to conduce to peace and good government, and were not therefore authorized by S. 72 of Sch. 9. It is sufficient answer to this to say that the Judicial Committee have laid down that this is not a matter for the Courts to investigate. It was next said that S. 3 (1) of the Ordinance was retrospective in its operation and that the Governor-General had no power to pass Ordinance with retrospective effect. This question has been discussed at some length in Federal Court Cases Nos. 13 to 21 of 1943²² and S. 3 (1) of Ordinance 19 is no more retrospective in its operation than S. 3 of Ordinance 14 of 1943 which was then held to be valid. We accordingly hold that S. 3 (1) of Ordinance 19 of 1943 confers validity and full effectiveness on sentences passed by special Courts functioning under the Special Criminal Courts Ordinance (Ordinance 2 of 1942) and that this provision is not ultra vires the Governor-General.

Two questions have arisen in the course of the hearing on the construction of S. 4 of the Ordinance. It has been brought to our notice that in some instances (Cases Nos. 39 and 54 before us) references which had to be made or have been made under S. 8 of Ordinance 2 of 1942 had either not been made or had not been disposed of by the Review Judge, when the new Ordinance (19 of 1943) came into operation. A question arises whether such cases fall under S. 3 (1) or S. 4 of the Ordinance. Section 4 purports to deal with cases of which the "trials" before the special Courts had not "concluded." The Advocate-General of the United Provinces admitted that the trial could be said to be concluded only when the Judge had pronounced his judgment (*vide* the way that the sections are grouped in sub-divisions F. & H. of Chap. 23, Criminal P. C.), but he maintained that the "review" proceedings under S. 8 of the Ordinance were no part of the trial. The Advocate-General of Bihar maintained that the trial must be held to have concluded as soon as the case became ripe for judgment (*vide* Chap. 26 of the Code which treats the judgment as coming after the close of the trial). Our attention was drawn in this connexion to A. I. R. 1933 Cal. 551²³ and A. I. R. 1938 ALL. 102.²⁴ The discussion in these cases only confirms what one would have thought even independently of them, viz., that the meaning of the word "trial" must largely

depend on the context and the scheme of the enactment in which it occurs. Though the word may sometimes denote only the recording of evidence, it is obvious that in the context in which it occurs in Ordinance 19 of 1943 it must comprise all stages of the proceeding, including the imposition of the sentence. The contradistinction made by the Ordinance is between cases in which a sentence had been passed by the special Courts and cases in which no such sentence had been passed, the former falling under S. 3 (1) and the latter under S. 4. If it should be assumed that the two categories might not be exhaustive and cases might be conceived which even while not falling under S. 4 might not fall under S. 3 (1), the result would only be that the proceedings in such cases would be void under the former decision of this Court and the accused would have to be retried before the regular Courts. The cases which are dealt with by cls. (a) and (b) of S. 8 of Ordinance 2 of 1942 stand on a special footing. The two clauses provide for review of the Special Judge's judgment by one of the Judges of the High Court nominated by the Provincial Government. The word "review" does not appear to have been used in any technical sense there, but it obviously differs both from a review as understood in the Civil Procedure Code as well as an appeal, because these proceedings are ordinarily initiated by the party concerned. The scheme of S. 8 of Ordinance 2 of 1942 is that in the more serious classes of crimes therein referred to, the sentence of the Special Judge should, apart from any initiative of the accused, be considered by the reviewing Judge. There is of course a difference between cls. (a) and (b) to this extent that in cases falling under cl. (a) the review follows compulsorily and automatically, whereas in cases falling under cl. (b) the review procedure becomes available only if the Special Judge thinks it necessary to submit the case to the reviewing Judge. But once the case has been so submitted, there is no difference in the legal position between cases falling under cl. (a) and cases falling under cl. (b) of S. 8. It may perhaps be putting the position too high to describe the sentence of the Special Judge in these cases as only provisional or tentative; but the scheme of the section undoubtedly is that the proceeding against the accused in such cases is not to be regarded as complete till after the review is over. In this view, we are of the opinion that in all cases falling under S. 8 (a) and in all cases where references had been made by the Special Judge under S. 8 (b) the

22. Reported in ('43) 30 A. I. R. 1943 F. C. 75, Emperor v. Sibnath Banerjee, etc.

23. ('33) 20 A. I. R. 1933 Cal. 551 : 34 Cr. L. J. 684; 37 C. W. N. 906, Jiban Molla v. Emperor.

24. ('38) 25 A. I. R. 1938 All. 102; I.L.R. (1938) All. 157 : 39 Cr. L. J. 345, Bakshi Ram v. Emperor.

accused will have to be tried under S. 4 of Ordinance 19 of 1943, unless the reviewing Judge, acting under the Special Criminal Courts Ordinance, had given his decision before the new Ordinance 19 of 1943 came into operation. The words "whether or not the proceedings in which the sentence was passed were submitted for review under S. 8" in cl. (2) of S. 3 must be taken to have been used only to indicate that even the adverse termination of the review proceedings would not exclude the right of appeal and revision given by the clause. The possibility that the High Court as a Court of appeal or acting as a confirming Court under Chap. 27, Criminal P. C., may consider or confirm the sentence will not in our opinion suffice to bring this special class of cases under S. 3 (1) of the new Ordinance, or take them out of the operation of section 4.

A further contention was advanced with reference to cases in which the accused had been sentenced to death by the special Courts. It was argued that as under Ss. 31 and 374, Criminal P. C., a sentence of death passed by a Sessions Judge was subject to confirmation by the High Court and as no such confirmation by the High Court as such had been provided for in the Ordinance, one of two consequences must follow: either the unconfirmed sentences must be treated as incapable of execution on the ground that there was no one who could properly refer them for confirmation, or the cases should be treated as pending cases within the meaning of S. 4 of the Ordinance. Whilst we agree that such sentences cannot be executed until confirmed by the High Court, we can see nothing to prevent the judicial officer who passed the sentences or the Sessions Judge for the time being referring them for confirmation to the High Court. We are also unable to accede to the contention that such cases can be treated as falling under S. 4 even after they had been dealt with by a Review Judge under S. 8 of Ordinance 2 of 1942. Section 4 of Ordinance 19 can be invoked only in cases where the trial before the special Courts had not concluded. The High Court acting as such under the Criminal Procedure Code cannot be spoken of as a "special Court" within the meaning of the above provision. We now turn to the individual cases before us.

Cases Nos. 39 and 54.—In these two cases the convicted persons have come up in appeal against judgments of the Patna and Allahabad High Courts respectively dismissing their appeals from sentences passed by Special Judges. In both cases the sentences were sub-

ject to review under S. 8 (a) of Ordinance 2 of 1942. On the date of the commencement of Ordinance 19 of 1943 the review had not been completed. These cases therefore fall within the purview of S. 4 of that Ordinance, with the result that the proceedings had in respect of them before the Special Judges must be held to be void and the cases must be deemed to have been transferred to the appropriate Court under that section for inquiry and trial in accordance with the provisions of the Criminal Procedure Code. The appeals in these two cases are allowed and further proceedings will be taken in accordance with the provisions of S. 4 of Ordinance 19.

Cases Nos. 35, 36, 43, 44, 45, 46 and 49.

—Cases Nos. 35 and 36 are appeals from orders of the Patna High Court refusing writs of habeas corpus, while case No. 49 is an appeal from an order of the Madras High Court refusing writ of certiorari. Cases Nos. 43, 44, 45 and 46 are appeals from a preliminary judgment of the High Court at Nagpur upholding the validity of S. 3 (1) of Ordinance 19 of 1943. The conclusions at which we have arrived concerning the validity and effect of S. 3 of the Ordinance must result in the dismissal of all these appeals and we order accordingly.

Cases Nos. 40, 41 and 42.—These are appeals from judgments of the Patna High Court dismissing in each case the appeal of the convict from a sentence of death and confirming the sentence passed by a Special Judge for the offence of murder in the first two cases and for the offence of waging war against His Majesty the King in the third case. In these and in other cases where the High Courts had dismissed the appeals of the convicts on the merits, we granted leave on applications made to us for grounds on the merits of the cases to be raised before us. In some of these cases counsel made attempts to persuade us to assess the weight of evidence for ourselves in order to determine whether the conviction was or was not justified in each case on the evidence. This we declined to do as we hold the view that in cases of this description we should ordinarily accept as final the conclusions of fact at which the High Court has arrived unless it can be shown that the High Court has either misread any part of the evidence or has overlooked any material portion of it. In these three cases we have not been shown sufficient grounds for disturbing the conclusions at which the High Court has arrived concerning the guilt of the appellants.

As regards the sentence it was urged that the death sentence imposed in these cases

a should be reduced to transportation for life on account of the time that has elapsed since the sentences were first pronounced : see 21 I. C. 882²⁵ at p. 893. It is true that death sentences were imposed in these cases several months ago, that the appellants have been lying ever since under threat of execution, and that the long delay has been caused very largely by the time taken in proceedings over legal points in respect of the constitution of the Courts before which they were tried and of the validity of the sentences themselves. We do not doubt that this Court has power, where there has been inordinate delay in executing death sentences in cases which come before it to allow the appeal in so far as the death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. But this is a jurisdiction which very closely entrenches on the powers and duties of the executive in regard to sentences imposed by Courts. It is a jurisdiction which any Court should be slow to exercise. We do not propose ourselves to exercise it in these cases. Except in case No. 47 (in which we are commuting the sentence largely for other reasons as hereafter appears), the circumstances of the crimes were such that if the death sentence which was the only sentence that could have been properly imposed originally, is to be commuted, we feel that it is for the executive to do so. We do not doubt that in each case the executive will give the fullest consideration to the period that has elapsed since the original imposition of the sentence and to the consequent mental suffering undergone by the convict. It has been further suggested that in England when cases in which a death sentence has been imposed are allowed to be taken to the House of Lords on account of some important legal point, the consequential delay in finally disposing of the case is treated as a ground for the commutation of the death sentence, and that if such a practice is recognized in cases which go with the Attorney-General's authority to the House of Lords because they "involve some point of law of exceptional public importance" [Criminal Appeal Act, 1907, s. 1 (6)] a similar course might well be taken in this country in these cases in connexion with which "substantial questions of law as to the interpretation of the Constitution Act" have twice had to be considered by this Court in view of the granting by High Courts of certificates under S. 205,

25. ('13) 21 I.C. 882 : 17 C.W.N. 1213 : 14 Cr.L.J. 642, Autar Singh v Emperor.

Constitution Act. We consider however that these matters are primarily for the consideration of the Executive and do not in the circumstances of these cases justify us in commuting the death sentences by orders of this Court. With these observations we dismiss these appeals.

Case No. 47.—The appellant in this case was convicted by a Special Judge of the offence of murder and was sentenced to death on 30th September 1942. His appeal to the Allahabad High Court was dismissed and the sentence of death was confirmed. The appellant is a young man of 25 who has been twice widowed. His victim was his aunt, 30 years of age, whose husband (Kanchan) had about six years previously murdered his own brother, appellant's father. Kanchan was sentenced to death for the murder, but lost his reason while awaiting the execution of the death sentence, and is now detained as a lunatic. The evidence in this case leaves no room for doubt that the appellant was rightly convicted of murder. There is some confusion as to the exact motive for the undoubtedly brutal assault of which the appellant made his aunt the victim. The prosecution alleged that the appellant being a widower was chagrined by the refusal of his aunt to become his mistress. In his statement before the Special Judge he said that another uncle (P. W. 7) who according to the appellant was behind the prosecution was on terms of improper intimacy with the deceased and resented even small acts of kindness on the part of the deceased towards the appellant. In the appeal preferred by him through the jail authorities to the High Court, the appellant stated that his aunt was a woman of loose character and was pursuing him with unwelcome attentions. The previous history of this family indicates that the appellant probably suffers from an unbalanced mind. The nature and ferocity of the assault upon his aunt appear to confirm this. In committing the offence the appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sentence of death. We accordingly reduce the sentence of death to one of transportation for life and subject to this modification dismiss the appeal.

Case No. 38.—The appellants in this case, Jagan Nath Sahu and Ramanand Sahu were convicted by a Special Judge of the offence

a of rioting and mischief by fire and were sentenced to three years' rigorous imprisonment and a fine of Rs. 300, in the case of Jagan Nath, and four years' rigorous imprisonment and a fine of Rs. 300, in the case of Ramanand. Their appeal was dismissed by the Patna High Court. The appellants are alleged to have been members of an unlawful assembly consisting of about two thousand people who raided a police beat house on 21st August 1942, and destroyed various items of Government property, and also looted a post office and a liquor shop close by. The question on b the complicity of the two appellants before us in these events has been satisfactorily established. On the evening of 21st August an entry (Ex. 1) was made in the station diary kept at the beat house, by the Assistant Sub-Inspector in charge of the beat house, recording a brief summary of the incidents that took place in the course of the riot but omitting all mention of the names of any accused persons in connexion therewith. On 26th August, Bansilal Chaudhury (P. W. 4), the liquor vendor, and Umapat Labh (P. W. 6), the branch postmaster, handed to the police reports in respect of the incidents relating to c the liquor shop and the post office respectively. These reports are Ex. 3 and Ex. 5. Exhibit 3 contains the names of eleven persons including those of the appellants, while Ex. 5 refers to a mob consisting of Ramanand Sahu and others. The formal first information report was not drawn up till 3rd September 1942. It contains the names of the appellants and several others. The evidence in the case consists of the testimony of Siva Chandar Tewari (P. W. 1), Assistant Sub-Inspector in charge of the beat house; Ramanand Singh (P. W. 2), constable, and Abbas Mian (P. W. 3), dafadar, both attached to the beat house; Bansilal Chaudhury (P. W. 4); Nagina Prasad (P. W. 5), d Sub-Inspector of Police, who carried out the investigation; and Umapat Labh (P. W. 6). These witnesses were examined in Court on 21st and 22nd December.

The investigation had been supervised by Babu Rameshwar Prasad Singh, Divisional Inspector. On the morning of 23rd December a petition was put in on behalf of Ramanand Sahu asking that Babu Rameshwar Prasad Singh should be summoned as a witness, as it was the case of Ramanand Sahu that none of the prosecution witnesses had during the investigation mentioned his name to this officer as an accused person. This application was rejected by the Special Judge on the grounds, first, that the witness had been

transferred to a neighbouring district and that undue delay would be occasioned to the trial if he were to be summoned to give evidence, secondly, that the application ought to have been made earlier and that there was no explanation for the delay in making it, and thirdly, that the evidence of the witness was not material. We are unable to appreciate the reasons given by the Special Judge for declining to summon this witness. In our opinion, he was a material witness and should have been examined as a prosecution witness or at least offered for cross-examination. His transfer to a neighbouring district should have made no difference as it should have been possible for the Crown to procure his attendance with the minimum of delay. The necessity for procuring the attendance of this witness for examination became apparent to the particular accused and his advisers only on 22nd December during the examination of Nagina Prasad (P. W. 5). We fail to see how the accused could be charged with undue delay in making the application. On this ground alone we would have been disposed to hold that serious prejudice had been occasioned to Ramanand Sahu, appellant, by the failure of the Judge to direct the attendance of this witness.

There are other unsatisfactory features in the case and, on the evidence, we do not think the conviction in this case can be sustained. To continue with the case of Ramanand Sahu, his name is found in the first information report both in the list of accused persons as well as among the witnesses. He was examined by the police during the course of the investigation as a witness, though the investigating officer made an attempt to explain this away by saying that he was examined as an accused person. As no other accused person was examined during the course of the investigation it is difficult to accept this explanation as g correct. Further in the first information report of 3rd September 1942 the Assistant Sub-Inspector states, after describing the incidents, that he asked the accused "who was present in the mob to see to this occurrence but he replied that he was unable to do anything as the mob was out of control." This is not easily reconcilable with the view that the accused was himself one of the rioters. The Special Judge found that the investigating police were not able to make up their minds for some time whether Ramanand Sahu was present with the mob as a member of the unlawful assembly or as an innocent spectator. If that was so, it is not possible to maintain his conviction for the reason that the only h

a evidence that can be taken into account against him on behalf of the prosecution is the testimony of P. W. 1 (Assistant Sub-Inspector) and P. W. 3 (Police dafadar). This testimony was available to the police at the earliest possible moment and if true should have put the matter of the complicity of Ramanand Sahu in the riot beyond doubt. If nevertheless the investigating police could not make up their minds with regard to the complicity of Ramanand Sahu, the only inference to be drawn therefrom is that they were not satisfied with the statements of these two witnesses made in the course of the investigation.

b It is true that P. W. 2 (Ramanand Singh, constable) also mentioned Ramanand Sahu's name at the trial as one of the rioters, but it has been established that this witness had stated during the investigation that he was being so much mobbed during the riot that he was unable to identify anyone. His subsequent statement in Court against Ramanand Sahu was therefore worthless. Both Ramanand Sahu and Jagan Nath Sahu were stated by P. W. 4 and P. W. 6 to have taken part in the riot, but the testimony of these two witnesses was rightly rejected by the High Court on the ground that they did not mention the names of these two accused persons before the Deputy Superintendent of Police during the investigation. The prosecution case is, however, open to challenge on a more serious ground. According to the investigating Sub-Inspector the names of certain rioters, including those of the two appellants, were definitely ascertained immediately after the riot; yet he gave instructions to the Assistant Sub-Inspector not to enter the names of the accused persons in the entry made in the station diary (Ex. 1) the same evening "as a matter of precaution." The explanation given was that as copies of the entries in the station diary had to be sent to head-quarters and the countryside round about was in a very disturbed state it was feared that a copy of the entry might fall into the hands of the rioters or their sympathizers and that this might attract reprisals against the police. We do not consider this explanation satisfactory. The apprehension of reprisals, if it was at all justified, would result just as much from the fact of the incident of the riot being entered in the diary as from the mention of the names of accused persons in it. As a matter of fact the diary does mention the name of Ramanand Sahu as a person near whose house the mob was when it was first observed by one of the police witnesses. The direction by the Sub-Inspector deliberately to keep the names of

the accused persons out of the diary raises so strong a doubt with regard to the whole of the prosecution case that, taking it with the other features of the case that we have mentioned above, we are forced to the conclusion that it would not be safe to maintain the conviction of either of the appellants. We, therefore, accept their appeal and acquit them. They must be released forthwith and the fines, if recovered, should be refunded.

Case No. 53.—In this case the five appellants were sentenced to rigorous imprisonment for a period of seven years, a fine of Rs. 200, and a whipping of ten stripes each for attacking a railway station and damaging the telephone and telegraph apparatus, machinery in a signal box and other Government property, about 1-30 P. M. on 15th August 1942. Their appeal to the Allahabad High Court was dismissed and the sentences were upheld. The Special Judge who tried the case found that the whole of the prosecution evidence was unsatisfactory but nevertheless convicted the appellants and some others who were acquitted by the reviewing Judge. The learned Judge of the High Court who dealt with the case on appeal took on some points a view of the evidence different from that taken by the Special Judge and upheld the conviction and sentences as he found that some of the prosecution evidence was less open to objection than the trial Judge thought was the case. We are unable to agree with this view. The first information report was alleged to have been drawn up at 3 P. M. on 15th August, almost immediately after the occurrence. The Special Judge found that the report was not made at 3 P. M. but after 7 P. M. and that it was deliberately "ante-timed." The learned Judge of the High Court did not reject this finding. This finding alone would be sufficient to cast serious doubt on the prosecution case with regard to the participation of particular individuals in the incidents that occurred at or near the railway station. Again, the prosecution case was that as the mob was damaging the telephone and telegraph apparatus the appellants along with others were arrested at or near the railway premises after a chase and were brought to the railway station where they were identified by the railway staff. This version was flatly contradicted by the railway staff, and the trial Judge found that the prosecution case on this point could not be accepted. With regard to the evidence of the station staff, the only observation made by the learned Judge of the High Court was that the matter was not of any very great importance and that the failure of the station staff to support

a the prosecution case on this point was immaterial. The learned Judge went on to find that the appellants were arrested in the manner alleged by the prosecution, but this was based more upon the improbability of the defence version on the point rather than upon the reliability of the prosecution evidence. This is unsatisfactory. We think that the finding of the trial Judge that the arrests were not made at or near the railway station was fully justified. We must point out that at the very least these two findings, namely, with regard to the time of the recording of the first information report and the time and place of the arrest, establish the complete unreliability of the police witnesses who were examined in the case.

The rest of the evidence consisted of the testimony of three headmen, three boys of the local vernacular school aged 11, 12 and 13, and two witnesses named Dip Singh and Kanhai. As regards the last named two witnesses, the trial Judge held that it was impossible to place any reliance upon their statements. The learned Judge of the High Court also ignored their evidence as he found that they had clearly been unwilling to give evidence against any of the accused. With regard to the headmen, c the finding of the trial Judge was that the witnesses were not present during the occurrence at all, nor did they take part in the arrests, and he consequently altogether ignored their testimony. The learned Judge of the High Court, on the other hand, held these witnesses to be witnesses of truth. We have gone carefully through the detailed reasons given by the trial Judge for rejecting the testimony of these witnesses and we agree with him that their evidence cannot be accepted as true. The learned Judge of the High Court did not consider all the reasons given by the trial Judge for disbelieving these witnesses. He dealt with d only one point in this connexion, namely, whether the witnesses had given good reasons for being present in the town where the riot took place on the day and at the time of the riot. He appeared to think that apart from any reasons given by these witnesses for being present in the town, it was quite natural that they should be in the town especially when there was some excitement going on about that period. He found the stories related by them quite natural and convincing. We regret we are unable to agree. In our opinion, it was the reverse of natural for these headmen who belong to neighbouring villages, to leave their villages where their duties lay, at a time of excitement. The trial Judge having given convincing reasons for rejecting the testimony of these

three witnesses, the learned Judge of the High e Court was not, in our opinion, justified in overriding the finding of the trial Judge merely because he had himself a feeling that this testimony should have been accepted. He should have tried to meet the detailed reasons given by the trial Judge in support of his finding before overriding it. We are ourselves unable to accept the evidence of these witnesses as true.

This leaves us with the evidence given by the three school boys. The position with regard to this is little better. It appears that these boys were taken into custody on the day of the riot and were only released on certain persons standing surety for them. At the f time of giving evidence at the trial, they were living with the sureties and not with their parents. One of them stated that he had been told that he could go home only after giving evidence. They made completely contradictory statements in their examination-in-chief and cross-examination. The trial Judge observed with regard to two of them that they had probably been won over by the defence and with regard to the third that he was making a tutored statement. The learned Judge of the High Court was of the opinion that these boys had been influenced against the prosecution and that they were not willing g witnesses. He concluded from this, however, that anything that they had stated against the appellants was worth a good deal more than it would have been if they had been friendly to the prosecution. We do not consider this a correct or fair approach. Once a witness has been found to be wholly unreliable it is unsafe to place any reliance upon any part of his testimony. It should not be open to the prosecution to pick out a bit here and a bit there from the evidence of a witness whom they themselves are not willing to accept as a witness of truth, and to use these salvaged bits, from testimony which is other. h wise contaminated, to bolster up their case against particular accused persons.

The gist of the learned High Court Judge's finding on the whole case is contained in the observation that there was really no explanation why anybody should have invented a false case against the appellants. This is not in our opinion a justifiable point of view to adopt in a case like the present where the prosecution evidence was found to be largely false and riddled with defects and contradictions. The prosecution having failed completely to establish the guilt of the appellants by good and reliable evidence, it was not for the appellants to explain why their names had been mentioned by the prosecution wit-

a nesses as persons who had participated in the riot. We have already stated why it is in our opinion unsafe to rely upon the testimony of the police witnesses in this case. As the trial Judge did, however, rely upon the testimony of Chhabnath Singh, constable, and based his finding with regard to the guilt of at least two of the appellants solely upon that evidence, we consider that an observation or two are called for in that connexion. The trial Judge stated that there was no reason to disbelieve this witness though he had undoubtedly made untrue statements on certain points. He then went on to observe that this witness had certainly falsely accused one of the persons whom the trial Judge acquitted on a positive finding that he was not present among the crowd that committed the riot. The trial Judge having found that this witness had told lies with regard to the time at which the first information report was recorded, with regard to the time and place of the arrests and with regard to the participation of Soney Lal accused in the riot, we fail to see how any reliance could be placed upon his testimony with regard to the alleged participation of other accused persons in the riot.

c The view that we take of the case is that the trial Judge gave good and convincing reasons for rejecting the testimony of the prosecution witnesses and wrote what in effect amounted to a judgment of acquittal. For some reason, however, he thought it the better part of wisdom to convict some at least of the accused persons who had been put on their trial before him. The learned Judge of the High Court should have treated the judgment as one of acquittal and should have addressed himself to the question whether in case of an appeal by Government he would have been justified in upsetting the judgment if it had been given the form, as it already possessed the substance of a judgment of acquittal. If the learned Judge of the High Court had approached the question from that point of view, we feel sure, he would have declined to reverse the trial Court's findings with regard to the value to be attached to the prosecution evidence and would have given effect to them by himself passing an order of acquittal. We are clearly of the opinion that on the record as it stands there is nothing to support the appellants' conviction, which must be set aside. We therefore accept the appeal, acquit the appellants and direct that they should be released forthwith, and that the fines, if recovered, should be refunded.

Cases Nos. 37, 50, 51 and 52. — In these cases the appellants were convicted by Special

Judges of serious offences committed during the disturbances of last year and were sentenced to various terms of imprisonment. Their appeals to the Patna High Court were dismissed. Nothing was urged before us which served to raise any doubt in our minds with regard to the propriety of the convictions and sentences. Our attention was however drawn to what we cannot but regard as a very serious irregularity committed by the Special Judge in Case No. 37 in recording the evidence of some of the prosecution witnesses, e.g., P.Ws. 3, 4, 5 and 7. The memorandum of the substance of the evidence of P. Ws. 1 and 2 having been recorded, the Judge contented himself in the case of several other witnesses with summarizing their examination-in-chief relating to the main incidents to which they were deposing by recording merely that they corroborated or supported the statement of P.W. 2, or gave the same story as P. W. 2. Under the provisions of S. 6 of Ordinance 2 of 1942, the Special Judge was not bound to record the evidence of any witness verbatim, but he was bound to record a memorandum of the substance of the evidence of each witness examined. The record of the evidence of P. W. 2 no doubt represents the substance of the evidence given by that witness. The statement that other witnesses corroborated or supported the statement of P. W. 2 or gave the same story as P. W. 2 with respect to certain incidents surely does not constitute a memorandum of the substance of the evidence given by those witnesses. We have no doubt that the failure on the part of the Judge to comply with the provisions of S. 6 of Ordinance 2 of 1942 put the accused at a certain disadvantage and occasioned a certain amount of prejudice to them in the conduct of their defence. We are however satisfied on an examination of the whole record that the irregularity did not in fact occasion a failure of justice. We dismiss these appeals. h

R.K.

Order accordingly.

A. I. R. (31) 1944 Federal Court 18
(From Calcutta)

8th December 1943

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Bank of Commerce Ltd. Khulna —

Appellant

v.

Amulya Krishna Basu Roy Chowdhury
— Respondent.

Cases Nos. 1 and 2 of 1943.

(a) Bengal Money-lenders Act (10 of 1940),
Ss. 2 (12) and 36 — Act falls within Sch. 7, List

a 2, Entry 27, Government of India Act and is within competence of Provincial Legislature — Provision for reopening of decrees on pronotes passed before Act is not ultra vires.

Assuming that the Bengal Money-lenders Act affects and was intended to affect rights and liabilities based on promissory notes, it does not necessarily follow that the Act must be wholly void as ultra vires the Provincial Legislature. The mere fact that provincial enactment may contain provisions bearing upon a subject exclusively reserved to the Federal Legislature will not suffice to invalidate the provincial enactment. For the purpose of determining whether a provincial Act is intra vires or not the subject-matter of the Act which depends upon what is true aspect of the Act must be considered. By 'aspect' must be understood the aspect or point of view of the legislator in legislating, the object, purpose and scope of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon. Judged by these tests, the Bengal Money-lenders Act must, taken as a whole, be held to fall within the description, legislation in respect of "money-lending and money-lenders," a subject within the exclusive competence of the Provincial Legislature (entry No. 27 in List II, Sch. 7, Government of India Act). The fact that among the documents on which moneys may be lent, promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of the provincial legislation. Any argument based on the exclusion of promissory notes from the sphere of provincial legislation would not avail in cases where promissory notes had merged in decrees made before the commencement of the Provincial Act (Bengal Money-lenders Act). Consequently S. 36 in providing for the reopening of decrees on pronotes passed before the Act and passing new decrees cannot be said to be ultra vires the Provincial Legislature. Section 36 (2) (a) cannot be read as relegating the parties to their rights and liabilities on the original cause of action. The decree is reopened only to the extent necessary to substitute the method of account-taking sanctioned by the Act in place of the calculation on which the original decree was passed : ('41) 28 A. I. R. 1941 F. C. 47, *Rel. on* ; ('41) 28 A. I. R. 1941 Cal. 498 (F. B.), *Approved*; 1891 A. C. 455, *Ref.*

[P 19g,h; P 20h; P 21a,d,e; P 22c,d]

(b) Interpretation of statutes — Doctrine of repugnancy and of ultra vires — Applicability — Question of severability of invalid provisions of Act from valid provisions — Relevancy of.

d The question of the severability of the invalid provisions of an Act from the valid provisions will be material only if the Act is in some measure held to be ultra vires the Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a Central enactment, each being intra vires, the particular legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act. Language has sometimes been employed in enunciating the doctrine of "occupied field" which may seem to suggest that in respect of a field occupied by Central legislation, the Provincial Legislature would have no power at all to deal with the subject. But it is the doctrine of repugnancy and not the doctrine of ultra vires that has to be applied in this class of cases.

[P 21h; P 22a]

P. R. Das and P. C. Basu, Senior Advocates, Federal Court, (S. C. Dutt, Advocate, Federal Court, with him), instructed by Ganpat Rai, Agent — for Appellant.

Sir B. L. Mitter, Advocate-General of India, (K. K. Basu, Advocate, Federal Court, with him), instructed by P. K. Bose, Agent — for Respondents.

S.M. Bose, Advocate-General of Bengal, (B. Das, Advocate, Federal Court, with him), instructed by B. Banerji, Agent — for the Province of Bengal.

Spens C. J. — These appeals arise out of applications made by two judgment-debtors for relief under S. 36, Bengal Money-lenders Act, 1940. The appellant's predecessor-in-title had obtained small cause decrees against the respondents in 1933 and 1938 respectively and certain payments had been made towards them. On 30th August and 1st September 1941, the judgment-debtors applied to the Court to reopen the decrees, scale down the debts and direct refund of amounts that might be found to have been overpaid on taking accounts according to the provisions of the Act. To these claims the appellant bank raised various objections, but they were overruled by the Subordinate Judge and the judgment-debtors were awarded small amounts by way of refund. The bank took the matter on revision to the High Court at Calcutta, on the plea that the decrees had been obtained on "promissory notes" and that the Provincial Legislature had no authority to enact measures affecting promissory notes. This contention was overruled by the High Court on the authority of a Full Bench decision of that Court 45 C. W. N. 609 : I.L.R. (1941) 2 Cal. 107.¹ That Full Bench judgment was based on the decision of this Court in 1940 F. C. R. 188.² The ratio decidendi in that case was that similar provincial legislation in pith and substance related to "money-lending and money-lenders" (Entry No. 27, List II of Sch. 7) and that any argument based on the exclusion of promissory notes from the sphere of provincial legislation would not avail in cases where claims under promissory notes had merged in decrees made before the commencement of the Provincial Act. On all material facts, these cases very closely resemble 1940 F. C. R. 188² and if, that decision is applicable here, these appeals must fail. Counsel for the appellant has accordingly attempted to distinguish that case with reference to certain differences in the provisions of the two provincial enact-

1. ('41) 28 A. I. R. 1941 Cal. 498 : 196 I. C. 161 : I. L. R. (1941) 2 Cal. 107 : 73 C. L. J. 333 : 45 C. W. N. 609 (F. B.), *Harsukhdass Balkissendas v. Dharendra Nath Roy.*

2. ('41) 28 A. I. R. 1941 F. C. 47 : 192 I. C. 225 : 1940 F. C. R. 188 : I. L. R. (1941) Kar. F. C. 25 (F. C.), *Subrahmanyam Chettiar v. Muthuswami Goundan.*

a ments. We have to decide whether these differences make any difference to the result.

The Bengal Money-lenders Act is like the Madras enactment which was the subject-matter in 1940 F. C. R. 188,² part of a scheme to relieve agricultural indebtedness in the various provinces of this country, but the enactments passed in the different provinces have not all adopted the same lines. The Bengal Act begins with a comprehensive definition of the words "loan" and "lender," but excepts certain kinds of loans from the operation of the Act by taking them out of the definition. It makes detailed provisions for the registra-
b tion and licensing of money-lenders and for the accounts to be maintained by them. The relief intended to be afforded by the Act is provided for in Chaps. 6 and 7. Chapter 6 fixes maximum rates of interest recoverable on loans and the total amount recoverable for interest and principal in respect of any loan. Chapter 7, of which s. 36 forms part, provides for the reopening of settlements and of decrees of Courts in certain circumstances and for other ameliorative orders. The portion of the definition section relevant to the present case runs as follows:

c "Loan means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan, but does not include * * *

(e) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note."

Among the relieving provisions, the relevant clauses are sub-ss. (1) and (2) of s. 36. Sub-section (1) gives the Court power to reopen transactions "in any suit to which this Act applies" and by the definition clause this expression includes not only suits instituted after 1st January 1939, and suits pending on that date, but even suits already disposed of, unless proceedings in execution of decrees passed
d therein had also been completed by that date. [See also proviso (ii) to s. 36 (1)]. Sub-section (2) of s. 36 provides that if in the exercise of the powers conferred by sub-s. (1) the Court reopens a decree, it shall "pass a new decree in accordance with the provisions of this Act."

Comparing the above provisions of the Bengal Act with the corresponding provisions of the Madras Act, three points of difference were emphasised by counsel for the appellant: (a) While the Madras Act contained no clear indication as to whether it was intended to affect promissory notes or not, the Bengal Act, by excluding promissory notes from exception (e) to the definition of loan, has clearly shown an intention to legislate in respect of promissory notes. (b) While s. 19 of the Mad-

ras Act was in terms limited to decrees passed before the commencement of the Act, the Bengal Act made provision by the same section for decrees passed before the commencement of the Act as well as decrees passed after the commencement of the Act. (c) While s. 19 of the Madras Act did not contemplate a reopening of the decree (but only its amendment), the Bengal Act expressly provided for the reopening of the decree and the passing of a new decree. Stress was laid on these three points of distinction with particular reference to certain observations contained in the judgments in 1940 F. C. R. 188.² Distinction (a) was represented as vital. It was contended that in 1940 F. C. R. 188² the Court repelled the contention as to the total invalidity of the Act only on the ground that the general language of the Madras Act could, by the application of the principle of (1891) A. C. 455,³ be so read as not to comprehend promissory notes within its scope. Where, as in the present case, the Provincial Legislature has shown a deliberate intention to deal with promissory notes as well, it was contended that such legislation was an attempt to trespass upon the exclusive field of the Federal Legislature (entry No. 28 of List I) and as such ultra vires the Provincial Legislature. It was also contended that
g as this provision was not an independent and severable provision, but part and parcel of the scheme of the Act worked out on the basis of the general definition of the term "loan," the doctrine of severability of the valid from the invalid provisions could not be pressed in aid and that the whole enactment must therefore be held to be void. The Advocate-General of India and the Advocate-General of Bengal suggested by way of answer to this argument that the provisions of Bengal Money-lenders Act, even in their application to promissory notes, did not on their proper construction affect the rights of holders in due course under
h the Negotiable Instruments Act, but only the rights of the immediate parties to the instrument and that this was only a matter of "contract" (entry No. 10 of List III of Sch. 7). In support of this argument, reliance was placed on ss. 29 and 36(5) of the Bengal Act. The interpretation of these sections is not by any means free from difficulty and as there are other objections to be considered in connexion with this line of argument, we prefer not to base our conclusion on it.

Assuming that the Bengal Act affects and was intended to affect rights and liabilities based on promissory notes, it does not seem

3. (1891) 1891 A. C. 455, *Macleod's case*.

a to us necessarily to follow that the Act must be wholly void as ultra vires the Provincial Legislature. In 1940 F. C. R. 188,² this Court discussed at some length the applicability of the principles laid down by the Judicial Committee in the Canadian cases to the interpretation of the Indian Constitution Act. According to those cases, the mere fact that a provincial enactment may contain provisions bearing upon a subject exclusively reserved to the Dominion Legislature will not suffice to invalidate the provincial enactment. The other considerations which are relevant to this question have been adverted to in the judgments b in 1940 F. C. R. 188,² but as the effect of the decisions of the Judicial Committee has been summarised in Lefroy's Treatise on Canadian Constitutional Law, it would be convenient to quote from that treatise. In S. 8 (on p. 80) the author observes that the absence of concurrent powers of legislation over certain subjects

c "must not be understood as meaning that if a given Act is intra vires of the Dominion Legislature, a precisely similar Act could under no circumstances be intra vires of a Provincial Legislature. For, as we shall see (*infra* p. 98), subjects which in one aspect and for one purpose fall within the provincial powers of S. 92 may in another aspect and for another purpose fall within S. 91. . . . It seems quite possible that a particular Act, regarded from one aspect, might be intra vires of a Provincial Legislature and yet regarded from another aspect might be also intra vires of the Dominion Parliament. In other words, what is properly to be called the subject-matter of an Act may depend upon what is the true aspect of the Act."

As a foot-note to this statement, the author refers to certain early Canadian cases to show that an Act respecting bills of lading might be passed by a Provincial Legislature as a matter relating to property and civil rights, while the Dominion Parliament might pass a similar Act as a necessary or convenient d matter to be dealt with in the regulation of trade and commerce. In S. 19 (on p. 95), he further observes :

"Whatever powers the Provincial Legislatures have as included within the enumerated subject-matters of S. 92 when properly understood, those powers they may exercise, although in so doing they may incidentally touch or affect something which might otherwise be held to come within the exclusive jurisdiction of the Dominion Parliament under some subject-matter enumerated in S. 91."

In S. 21 (on p. 98), the author refers again to the distinction founded on difference in aspects of legislation and observes :

"The cases which illustrate this principle show, by 'aspect' here must be understood the aspect or point of view of the legislator in legislating, the object, purpose and scope of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon."

Judged by these tests, the Bengal Money-lenders Act must, taken as a whole, be held to fall within the description, legislation in respect of "money-lending and money-lenders," a subject within the exclusive competence of the Provincial Legislature (entry No. 27 in List II). As pointed out in 1940 F.C.R. 188,² the fact that among the documents on which moneys may be lent, promissory notes form an important class will not justify the view that the regulation and control of money-lending have to that extent been taken out of the purview of provincial legislation.

The further question may no doubt still arise as to what is to happen in the event of f a conflict between provisions contained in a provincial enactment so far as they bear upon promissory notes and provisions relating thereto contained in a central enactment. Certain aspects of this question have been adverted to in 1940 F.C.R. 188² and the difficulty of applying S. 107, Constitution Act, to solve the conflict, so far as such conflict may arise out of central legislation bearing on List I subjects, but passed before 1935, has also been pointed out. Even if, as suggested by Sulaiman J. in that case, it should be held that such conflict should be resolved by an extension of the principle of S. 107 by analogy or by the appli- g cation of the Canadian doctrine of the "occupied field," that would not help the appellant in the present cases. That line of argument would not support the plea of ultra vires, but would only bring in the principle of repugnancy, that is, in the event of and in so far as there is a conflict between provincial legislation and central legislation, the latter shall prevail. In the present cases, we are not concerned with the rights of parties under a promissory note. Here, as in 1940 F. C. R. 188,² their rights and liabilities had merged in decrees even before the passing of the Bengal Money-lenders Act, and, subject to the obser- h vations to be made when dealing with points (b) and (c), the principle of that decision is equally applicable.

In this view, it is not necessary to refer at length to the arguments urged or authorities cited on the question of the severability of the invalid provisions of an Act from the valid provisions. The question will be material only if the Act is in some measure held to be ultra vires the Provincial Legislature. Where the problem can only be one of conflict between the provisions of the local law and the provisions of a central enactment, each being intra vires the particular Legislature, it is unnecessary to invoke the rule of severability to uphold the validity of the impugned Act.

a Language has sometimes been employed in enunciating the doctrine of "occupied field" which may seem to suggest that in respect of a field occupied by central legislation, the Provincial Legislature would have no power at all to deal with the subject. But having considered all the decisions bearing on that question, in our judgment it is the doctrine of repugnancy and not the doctrine of ultra vires that has to be applied in this class of cases.

Distinction (b)—as to the wide terms of the Bengal Act covering both decrees passed before the Act and decrees passed after the Act—was emphasised in view of an observation in 1940 F. C. R. 188.² It was there said that it might be necessary to draw a distinction between decrees passed on promissory notes before the commencement of the Act and decrees passed after the commencement of the Act, because in the latter case the Act might in substance interfere with rights which, at or after the date of its commencement, were only rights under promissory notes. This question, again, might assume some importance if the existence of provisions relating to promissory notes would have the effect of rendering the provincial enactment invalid. If, however, the operation of such provisions is only to be determined by the application of the doctrine of repugnancy, the circumstance that one and the same section provides for both kinds of decrees cannot affect the decision of the present cases, where admittedly the decrees had been passed before the Act came into operation.

Distinction (c) does not, in our opinion, amount to more than a verbal distinction. We do not understand S. 36 (2) (a) as relegating the parties to their rights and liabilities on the original cause of action. The decree is reopened only to the extent necessary to substitute the method of account-taking sanctioned by the Act in place of the calculation on which the original decree was passed.

We are accordingly of the opinion that these points of difference between the Bengal Act and the Madras Act do not warrant the conclusion that the present case differs in any essential respects from 1940 F. C. R. 188.² The appeals accordingly fail and are dismissed with costs (counsel's fee only in one case). According to the usual practice, there will be no order as to costs in favour of the Advocate-General of Bengal who intervened.

G.N.

Appeals dismissed.

A. I. R. (31) 1944 Federal Court 22
(From Bombay)

2nd November 1943

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Emperor

v.

Keshav Talpade — Opposite Party.

Case No. 10 of 1943 : For leave to appeal to His Majesty in Council, against order of Federal Court, Reported in ('43) 30 A. I. R. 1943 F. C. 1.

Government of India Act (1935), S. 208 (b) — Habeas corpus application dismissed by High Court — Appeal to Federal Court allowed — Detenue released by Government on their own initiative — Leave to Government for appeal to His Majesty in Council against Federal Court's order held should be refused.

An appeal against the order of the High Court dismissing a habeas corpus application was allowed by the Federal Court. But subsequently the detenue was released by the Government on their own initiative. In the application by the Government for leave to appeal to His Majesty in Council against the Federal Court's order allowing the appeal :

Held that as there was no longer any pending matter in which leave could be granted and the accused had no longer any interest in the habeas corpus proceeding no leave to appeal could be granted merely on the ground that the Government were disposed to question the correctness of some of the grounds on which the appellate order of the Federal Court was based.

[P 22g,h]

N. P. Engineer, Advocate-General, Bombay and
M. M. Desai instructed by B. Banerji —
for Appellant.

Sir B. L. Mitter, Advocate-General of India
and Radhe Mohan Lal instructed by K. Y.
Bhandarkar — for Governor-General in Council.

Order. — This is an application by the Government of Bombay for leave to appeal to His Majesty in Council against an order made by this Court on 22nd April 1943,* in an appeal arising out of a habeas corpus application. It is admitted that the detenue has been released by the Government on their own initiative, notwithstanding the dismissal of the habeas corpus application by the High Court. We are of the opinion that there is no longer any pending matter in which leave can be granted to appeal to His Majesty in Council. Moreover, the original petitioner, who has been released by the Government, has no longer any interest in the habeas corpus proceeding. In these circumstances, we do not see our way to grant leave merely on the ground that the Government are disposed to question the correctness of some of the grounds on which the order of this Court, dated 22nd April 1943,* was based. The application is accordingly dismissed.

G.N.

Application dismissed.

*See ('43) 30 A. I. R. 1943 F. C. 1.

A. I. R. (31) 1944 Federal Court 23

2nd November 1943

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Thakur Jagannath Baksh Singh —*
Applicant

v.

United Provinces—Opposite Party.

Case No. 29 of 1943 : Petition for leave to appeal to His Majesty in Council from judgment of Federal Court, Reported in ('43) 30 A.I.R. 1943 F. C. 29.

Government of India Act (1935), S. 208 (b)—
Leave to appeal to His Majesty in Council —
Grant of, depends on facts of each case—Deci-
b sion of Federal Court holding U. P. Tenancy
Act not ultra vires — Leave to appeal to His
Majesty held should be granted.The question of grant of leave to appeal to His
Majesty in Council must be dealt with on the facts
and circumstances of each case. It is neither possible
nor desirable to crystallise the rules relating to the
exercise of the Court's discretion in the matter.

[P 23g]

In the suit for declaration that the U. P. Tenancy
Act, 17 of 1939, was ultra vires as it offended against
the provisions of the Government of India Act, it
was also contended that the Act seriously curtailed
the pre-existing rights of the talukdars under sanads
issued to them at the time of the Oudh Settlement
and that in view of S. 3, Crown Grants Act, the
rights of the talukdars must be held to be unaffected
c by the provisions of the U. P. Tenancy Act. These
contentions were overruled by the Federal Court. In
the application for leave to appeal to His Majesty in
Council :Held that as the litigation involved not only a
question as to the interpretation of the Constitution
Act, but broader questions bearing on a controversy
which had long been agitated in the Courts in India,
namely, the nature and extent of the rights secured
to talukdars by the Oudh Settlement and the extent
of the immunity thereby secured to them from legis-
lative interference, and the decision in the case must
affect pecuniary interests of very large value and the
number of people (talukdars and tenants) vitally
interested in the decision of the question was undoubt-
edly very large and it was inevitable that the con-
troversy which had been acute in India for some
years must arise again and again every time that
d the Legislatures in India attempted to deal with the
rights of landholder and tenant in some of the Indian
Provinces, leave to appeal should be granted: ('30) 17
A.I.R. 1930 P. C. 209, Ref. [P 23h; P 24a]*P. L. Bannerjee with K. K. Raizada Advocate,*
Federal Court (instructed by B. Banerji
*Agent) — for Appellant.**Dr. N. P. Asthana (Advocate-General, U. P.)*
with Sri Naryan Sahai (instructed by Sumair
*Chand Jain, Agent) — for Opposite Party.***Order.**—This is an application by one of
the talukdars of Oudh for leave to appeal to
His Majesty in council against the decision
of this Court, dated 22nd April 1943,* in what
may be conveniently referred to as the United
Provinces Tenancy Act litigation. In 1939,the United Provinces Legislature enacted a
comprehensive law (United Provinces Ten-
ancy Act, 1939, No. 17 of 1939) dealing with
the rights of landholders and tenants in that
Province. The talukdars contended that sev-
eral of the provisions of that Act seriously
curtailed their pre-existing rights under sanads
issued to them at the time of the Oudh Settle-
ment and one of them filed the suit for a
declaration that the Act or at least certain of
its provisions were ultra vires, invalid and
inoperative. It was urged in support of this
claim that this legislation did not fall under
entry No. 21 of List 2, Sch. 7, Constitution
Act, and that some of the impugned provi-
sions were opposed to the spirit, if not the
letter, of ss. 299 (2) and 300 (1), Constitution
Act. Reliance was also placed on the broader
ground that the doctrine that a grantor might
not derogate from his own grant applied even
to limit legislative powers and it was lastly
contended that in view of the provisions of
S. 3, Crown Grants Act, 1895, the rights of the
talukdars must be held to be unaffected by
the provisions of the Tenancy Act. These
contentions were overruled by the trial Court
as also by this Court. Hence this application
for leave to appeal to His Majesty in Council.Opposing the application, the Advocate-
General of the United Provinces maintained
that the circumstances of the present case
differed in no material respect from some of
the previous cases in which this Court had
declined to grant leave and he drew our
attention to the reasons given in some of
those cases. Those very judgments make it
clear that the question of grant of leave to
appeal must be dealt with on the facts and
circumstances of each case and that it is
neither possible nor desirable to crystallise
the rules relating to the exercise of the Court's
discretion in the matter. The present litiga-
tion involves not only a question as to the
interpretation of the Constitution Act, but
broader questions which bear on a controversy
which has long been agitated in the Courts
in India, namely, the nature and extent of
the rights secured to talukdars by the Oudh
Settlement and the extent of the immunity
thereby secured to them from legislative in-
terference. The affidavit accompanying the
present petition for leave makes it clear that
the decision in this case must affect pecuniary
interests of very large value. The number of
people (talukdars and tenants) vitally inter-
ested in the decision of this question is un-
doubtedly very large and it is inevitable that
this controversy which has been acute in this
country for some years must arise again and

* See ('43) 30 A.I.R. 1943 F. C. 29.

a again every time that the Legislatures in India attempt to deal with the rights of landholder and tenant in some of the Indian Provinces. The judgment of their Lordships of the Judicial Committee in 57 I. A. 228¹ has not touched upon the questions raised in the present litigation. All these circumstances make this a case in which in our judgment leave should be granted. Leave is accordingly granted.

G.N.

Leave granted.

1. ('30) 17 A.I.R. 1930 P. C. 209 : 125 I. C. 871 : 58 Cal. 430 : 57 I. A. 228 (P.C.), Prabhatchandra Barua v. Emperor.

b

A. I. R. (31) 1944 Federal Court 24 (1)

(From Bombay)

2nd November 1943

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Keshav Talpade — Appellant

v.

Emperor.

Case No. 31 of 1943 : Appeal from order of High Court, Bombay, in Criminal Appln. No. 86 of 1943, D/- 2nd July 1943.

c Federal Court — Appeal against dismissal of application for writ of habeas corpus—Detenue released on date of appeal—Appeal held should be dismissed.

An appeal against an order dismissing an application for writ of habeas corpus was filed to the Federal Court. The detenue was released on the same day on which the appeal was filed :

Held that as the accused was no longer in custody no order could be made on the habeas corpus application and therefore the Federal Court would not pronounce an opinion on the correctness of the order appealed against and the appeal must be dismissed on the ground that no order on the habeas corpus application could be made. [P 24e, f]

G. N. Joshi and D. P. Dhupker instructed by R. G. Naik — for Appellant.

d Sir B. L. Mitter, Advocate-General of India and Radha Mohan Lal instructed by K. Y. Bhandarkar—for Governor-General in Council.

Judgment.—This appeal arises out of an application for a writ of habeas corpus made by the appellant to the Bombay High Court in February 1943. The matter had come before this Court on two previous occasions in April* and May† 1943, but the orders of this Court on those occasions did not finally dispose of the matter. By its order dated 2nd July 1943, the High Court (by a majority judgment) dismissed the application and this appeal has been preferred against that order. The appellant takes exception to the grounds

on which the High Court has rested its judgment, including its view as to the effect of the orders of this Court. But it is admitted that the appellant has already been released. This appeal was filed on 10th August and it is stated by the Advocate-General of Bombay that the appellant was released on that very day, though it is not quite clear whether the order of release was passed on that date or the appellant was in fact set free on that date. As the appellant is no longer in custody, his learned counsel admits that no order can hereafter be made on the habeas corpus application; but he nevertheless asks us to pronounce an opinion on the correctness of the High Court's judgment. We do not see our way to adopt any such course. All that can be done at this stage is to dismiss the appeal on the ground that no order on the application can now be made.

G.N.

Appeal dismissed.

A. I. R. (31) 1944 Federal Court 24(2)

(From Patna)

1st December 1943

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Hulas Narain Singh — Applicant

v.

Deen Mohammad Mian and others —

Opposite Party.

Cases Nos. 14 and 48 of 1943, from decision of Federal Court, Reported in ('43) 30 A. I. R. 1943 F. C. 9.

(a) Government of India Act (1935), S. 208—Point of law not substantial—Question affecting large number of people — Still application for leave should be refused.

Although the question raised in the litigation be one affecting a large number of people, both zamindars and ryots, in the Province of Bihar, if the points of law are by no means substantial, the application for leave to appeal should be dismissed : ('43) 30 A. I. R. 1943 F. C. 9; 1 I. A. 282 (P. C.) ; ('30) 17 A. I. R. 1930 P. C. 209 and ('42) 29 A. I. R. 1942 F. C. 8, Ref. [P 25b,d]

(b) Practice—Federal Court—Direct approach by clients outside hearing deprecated — Legal practitioners encouraging clients to such action act improperly.

The Federal Court looks to counsel at the hearing to put their client's case and direct approaches to the Court outside the hearing are most improper and quite useless and if it has been done under legal advice, legal practitioners are acting most improperly in assisting in the preparation of or encouraging any such action on the part of lay clients. [P 25e,f]

Sardar Raghbir Singh, Advocate, Federal Court instructed by Tarachand Brijmohanlal, Agent — for Applicant.

Order. — This is an application for leave to appeal to His Majesty in Council against

* See ('43) 30 A. I. R. 1943 F. C. 1.

† See ('43) 30 A. I. R. 1943 F. C. 72.

a the judgment of this Court in 206 I. C. 387,¹ (Case No. 14 of 1942). The applicant, who is a zamindar of Bihar, instituted the original suit for recovery of rent from some of his ryots, on the footing that by the custom of the estate he was entitled to a half share of the produce by way of rent. In 1937, the Bihar Legislature had enacted S. 178B, Bihar Tenancy Act, limiting the rent to nine-twentieths of the produce. The plaintiff contended that this provision was inoperative and ultra vires the Bihar Legislature. The contention was rejected by the High Court at Patna² and by this Court also.

b It is true that the question raised in the litigation is one affecting a large number of people, both zamindars and ryots, in the Province of Bihar. But the points of law are by no means substantial. The whole argument in support of the appeal was based upon the effect and implications of the Permanent Settlement; and this Court as well as the Courts in Bihar held that the Permanent Settlement had not deprived the Provincial Legislature of the power to enact measures calculated to regulate the rights and liabilities of landholders and ryots inter se in the Province. In support of the application, reliance was placed on the fact that leave to appeal had recently been granted to one of the taluqdars of Oudh. The position there was different. The circumstances attending the settlement with the taluqdars gave scope for certain contentions based on the Crown Grants Act and on the doctrine that the Crown cannot derogate from its own grant. No such contention is available in this case. There was also the fact that the questions there raised had so far not been dealt with in any judgment of their Lordships of the Judicial Committee. As regards the Permanent Settlement, however, we have clear pronouncements. As early as 1874, their Lordships of the Judicial Committee explained that the expression "proprietor" had been used in the Permanent Settlement only as denoting the person who is directly liable to pay the revenue to Government: see 1 I.A. 282³ at p. 306. The effect and implications of the Permanent Settlement were fully discussed by their Lordships in

1. ('43) 30 A.I.R. 1943 F. C. 9 : 206 I. C. 387 : 22 Pat. 428 : I.L.R. (1943) Kar.F.C. 17 (F. C.), Hulas Narain Singh v. Deen Mohammad Mian.
2. See ('42) 29 A.I.R. 1942 Pat. 296 : 199 I.C. 182 : 21 Pat. 336 : 23 P.L.T. 143, Deen Mohammad v. Hulas Narain Singh.
3. ('73-74) 1 I. A. 282 : 14 Beng. L. R. 115 : 21 W. R. 358 : 3 Sar. 318 (P. C.), Collector of Trichinopoly v. Lekkamani.

1944 F.C./4 & 5

I.L.R. (1930) Cal. 430.⁴ This Court has dealt with the question not merely in this appeal, but also in 1942-5 F.L.J. F.C. 1.⁵ As pointed out in the judgment sought to be appealed against, the power of the Legislature to enact measures for the protection and welfare of ryots and other cultivators was expressly referred to and reserved at the time of the Permanent Settlement itself. This application is accordingly dismissed.

We would add the following remarks :

After the last hearing before this Court and before judgment was delivered an attempt was made by the appellant to persuade the members of this Court to reconsider the case f by forwarding direct to the Court further matter not brought to their notice by counsel arguing the case at the hearing. This action on the part of the appellant appears to have been taken on legal advice. Again during the interval between the date when this application was heard and today, the appellant has approached members of this Court direct in the same way and apparently for the same purpose and again these approaches appear to have been made on legal advice. It is surely hardly necessary to state that this Court looks to counsel at the hearing to put their client's case and that direct approaches to the Court g outside the hearing are most improper and quite useless and that if it has been done under legal advice legal practitioners are acting most improperly in assisting in the preparation of or encouraging any such action on the part of lay clients.

R.K. *Application dismissed.*

4. ('30) 17 A. I. R. 1930 P. C. 209 : 125 I. C. 871 : I. L. R. (1930) 58 Cal. 430 : 57 I. A. 228 (P. C.), Prabhat Chandra Barua v. Emperor.
5. ('42) 29 A.I.R. 1942 F.C. 8 : 199 I. C. 1 : I.L.R. (1942) Kar. F. C. 1 : 21 Pat. 521 : 1942 F.C.R. 15 : 1942-5 F. L. J. F. C. 1 (F.C.), Hulas Narain Singh v. The Province of Bihar.

A. I. R. (31) 1944 Federal Court 25

(From Oudh : ('44) 31 A. I. R. 1944 Oudh 1 47)

7th February 1944

SPENS C. J., VARADACHARIAR AND ZAFRULLA KHAN JJ.

Thakur Raghubar Singh and others
Appellants

v.

Emperor.

Case No. 33 of 1943.

(a) Insurance Act (1938), Ss. 107 and 104 — Offences under Act — Sanction under S. 107 to Provincial Government to initiate proceedings — Validity of — Authorisation to Provincial Advocate-General, to grant sanction under S. 107 is valid.

No doubt Legislation in respect of Insurance and the creation of new offences in respect of Insurance come exclusively within the legislative powers of the Central Legislature by reason of the provisions of S. 100 and List I Items 37 and 42 Sch. 7, Government of India Act. But S. 49 (2), Government of India Act, does not prohibit the ordinary executive machinery of a province being put into action in respect of offences created by central legislation unless there be an express prohibition in the legislation itself. It cannot be said that merely because an offence is created by an enactment of the Central Legislature, operating in the exclusive legislative sphere of the Central Legislature, the provincial authorities responsible for enforcing criminal law are incompetent to prosecute or initiate prosecutions for such offences. It may of course be that the enactment of the Central Legislature may expressly limit initiation of proceedings to officials of the Central Executive or may require the previous sanction of some other person or authority before proceedings can be commenced in respect of such an offence. Section 124 (2) of the Constitution Act clearly enables the Central Legislature to confer such a power or impose such a duty on an officer of a Province. It follows therefore that there can be nothing ultra vires in a Provincial Government taking steps to secure the enforcement of the law in respect of offences created by the Insurance Act or in the Advocate-General of the Province being specified in the Act as the person to control the initiation of proceedings under the Act. Therefore S. 107 might validly authorize the Advocate-General to sanction proceedings being initiated by his Provincial Government or some one on behalf of that Government and no objection can be taken on the ground that such authorisation would empower the Provincial Government to take action in a sphere to which its executive authority does not extend.

[P 28h; P29a,b,c]

(b) Insurance Act (1938), S. 107—Applicability and interpretation of—Pre-requisites and form of valid sanction indicated—General sanction in unlimited form held not valid: 1943 O. W. N. 339=(44) 31 A.I.R. 1944 Oudh 147=211 I. C. 220, *REVERSED*.

Section 107 indicates (a) that it applies to the initiation of all proceedings, civil or criminal, under the Act, (b) that the proceedings must be against one or more of the persons indicated, i. e., an insurer or a director, manager or other person mentioned, (c) that no person shall initiate proceedings unless that person has previous to the initiation of proceedings received the sanction to the initiation of such proceedings. It is clear therefore that before the sanction is given the Advocate-General must have proposals before him for the initiation by some person of particular proceedings of a defined nature under the Act against one or more of the specified persons and he must sanction the initiation of those proceedings by that person, and that if proceedings are initiated by some one other than the person to whom the sanction has been given, or if proceedings substantially different from those sanctioned are in fact initiated, the provisions of the section are not complied with and there will be no jurisdiction for a Court to entertain the proceedings. [P 29f,g]

Whilst it is desirable that the sanction should be given in writing and should on the face of it indicate reasonably clearly by statement or references to other documents the necessary matters above set out the section does not require any particular form of sanction or even that it should be always in writing. What is necessary is that if challenged by a defendant

or accused person the plaintiff or prosecutor should be able to establish to the satisfaction of the Court that the requisites of the sanctions as set out above have been complied with in respect of the sanction on which he relies, so that the Court can be satisfied that it has jurisdiction to entertain the particular proceedings before it. [P 29h;P30a]

The sanction of the Advocate-General under S.107 was given in respect of matters arising out of the first valuation report as at 15th May 1939 proceedings in respect of which might have been brought under the Insurance Act of 1912. The charges on which the convictions were obtained were all in respect of the report and balance sheet of 31st December 1939. The relevant portion of the sanction of the Advocate-General was in the following terms: "In exercise of the powers conferred by S. 107, Insurance Act (1938) I hereby sanction the institution of proceedings (prosecution) by the Government against (accused named) for offences committed against Insurance Law."

Held that a valid previous sanction was essential to the jurisdiction of the Court to entertain the proceedings. The generality of the form of the sanction could not justify the prosecution of the accused in respect of the report and balance sheet of 31st December 1939, merely on the ground that the accused were not prejudiced thereby. As the sanction related only to the first valuation report there was no valid sanction in respect of the report and balance sheet of 31st December 1939 and therefore the conviction of the accused could not be sustained: 1943 O. W. N. 339=(44) 31 A.I.R. 1944 Oudh 147=211 I. C. 220, *REVERSED*. [P 30e,f,g]

(c) Insurance Act (1938), S. 107—Sanction under—Accused can challenge validity of sanction — Valid previous sanction is essential to Court's jurisdiction to entertain proceedings in respect of offence under Act.

A valid previous sanction under S. 107 is essential to the jurisdiction of the Courts to entertain proceedings in respect of offences under the Act. Section 107 is intended to protect insurers, directors, managers and other persons indicated from the initiation of improper proceedings. Unless the protection is to be worthless, they must, if necessary, be entitled to challenge the sanction of the Advocate-General as not having been given to the person who initiates the proceedings or to the particular proceedings initiated against them. When objection is pressed to the validity of the sanction, it is the duty of the prosecution to establish that proper sanction had been obtained to the proceedings before the Court, so as to give the Court jurisdiction. [P 29h; 30f]

Rai Bahadur Harishchandra and Dr. Kailas Nath Katju, Senior Advocates (with Radhe Mohanlal and S. B. Bisaria) instructed by N. R. Bose, Agent — for Appellants.

Dr. N. P. Asthana, Advocate-General, United Provinces (with Nasirullah Beg) instructed by Sumair Chand Jain, Agent —

for the Crown.

Sir Brojendra Mitter, Advocate-General of India (with H. K. Bose) instructed by K. Y. Bhandarkar, Agent —

for the Governor-General in Council.

Spens C. J. — The Insurance Act of 1938 (Act No. 4 of 1938) was enacted by the Central Legislature on 26th February 1938. Section 1 (3) provides that it "shall come into force on such date as the Central Government

a may by notification in the Official Gazette appoint in this behalf." It in fact came into force on 1st July 1939 under a notification, dated 1st April 1939, in the Gazette of India. The two material sections of the Insurance Act for the purposes of this case are ss. 104 and 107, which are in these terms :

"104. Whoever, in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to one thousand rupees or with both.

b 107. (1) Except where proceedings are instituted by the Superintendent of Insurance, no proceedings under this Act, against an insurer or any director, manager or other officer of an insurer or any person who is liable under sub-s. (2) of S. 41 shall be instituted by any person unless he has previous thereto obtained the sanction of the Advocate-General of the province where the principal place of business in British India of such insurer is situate to the institution of such proceedings.

(2) This section shall apply in respect of a provident society as defined in Part 3 as it applies in respect of an insurer."

c On 25th March 1942, criminal proceedings were instituted by a complaint expressed to be a complaint under s. 104, Insurance Act, lodged by the Public Prosecutor at Lucknow against the appellants of whom 1 and 2 (Thakur Raghubar Singh and Kunwar Surendra Bahadur Singh) were the managing agents and 3 (Shyam Singh Rohatgi) the general manager of an insurance company called the All India United Assurance Company. The head office of this company was at Lucknow. This first complaint was followed up by a second complaint, also expressed to be under the same section, by the public prosecutor, dated 6th May 1942.

a The first complaint was based on an allegation that both in the first valuation report of the company as at 15th May 1939 and in its report and accounts for the period ending 31st December 1939 both issued over the signatures of the appellants amongst others, the appellants had deliberately made false statements to the effect that contributions were made by them to the company to the extent of Rs. 30,000. The second complaint was based on allegations of three further false statements in the first valuation report as at 15th May 1939, namely : (1) That under the heading "Cash, Cheques, and Bank Balances" of the All India United Assurance Co., as on 15th May 1939, an amount of Rs. 5162-13-9 was falsely shown in the balance-sheet although in fact there were no such balances; rather the company had considerably overdrawn from the bank; (2) That the

e figures of Rs. 62,903-3-2 as shown under the heading "Advances to Branches" in the same balance-sheet was also falsely shown, as no such advances were given to the branches; the third not material; and a fourth merely in the following terms: "(4) That in the same way the balance-sheet for the period ending 31st December 1939 was also false in respect of these items."

The first complaint concluded with the statement that the Advocate-General of the Province had sanctioned the prosecution of the accused as required by s. 107 of the Act and that that sanction was filed with the complaint as Annexure (C). The sanction filed with the complaint was in the following terms :

"In exercise of the powers conferred by s. 107 of the Insurance Act (4 of 1938), I hereby sanction the institution of proceedings (prosecution) by the Government against (1) Mr. Shyam Singh Rohatgi, General Manager, and (2) Kunwar Surendra Bahadur Singh Bhadoria, and (3) Kunwar Raghubar Singh (Partners of Kunwarji & Co.) Managing Agents, of the All India United Assurance Co., Ltd., Lucknow, for offences committed against Insurance Law."

It is addressed to the Secretary to Government, United Provinces, General Administration Department, Lucknow. It is numbered 1913/I-224 and dated Allahabad 10th December 1941 and is signed by the Advocate-General of the United Provinces. The second complaint commenced as follows :

"That as sanctioned by the Advocate-General of the United Provinces the petitioner has presented a petition in this Hon'ble Court on 25th March 1942, against the above noted accused for preparing false balance-sheets."

It then proceeded to refer to the fact that in the petition the public prosecutor had more specifically referred to the contribution of Rs. 30,000 and then begged specifically to allege the further items referred to above as having been falsely shown in the balance-sheet of the company and prayed that the accused might be tried in respect of these items also.

In due course charges were framed by the City Magistrate against the accused based on these complaints. The City Magistrate in fact framed two separate charges. The first related to the alleged false statements set out in the two complaints as having been made in the valuation report as at 15th May 1939, while the second charge dealt with the very vaguely indicated false statements in the balance-sheet and accounts of 31st December 1939. Before the trial was concluded before the City Magistrate it was remembered that the Insurance Act only came into force on 1st July 1939. It was accordingly held that no

a charges under S. 104 of the Act could lie in respect of alleged false statements made in the first valuation report as on 15th May 1939. Convictions were, however, recorded against the accused on the three charges formulated in respect of alleged false statements in the report and accounts of the company for the period ending 31st December 1939. These charges were that the accused had wilfully made false statements in the said balance-sheet and accounts knowing them to be false in the following material particulars: (1) That a contribution of Rs. 30,000 had been made by them and this amount was shown b in the then existing assets of the company; (2) that a sum of Rs. 4571-15-9 existed in the funds of the company under the heading "Cash and Bank Balances;" and (3) that Rs. 43,495-1-6 was the amount of "agents' balances, including branches." Each of the accused was sentenced to six months' rigorous imprisonment and a fine of Rs. 500 with further rigorous imprisonment for three months in default. Against this conviction the appellants appealed to the Sessions Judge. On 1st July 1943, the Sessions Judge confirmed the conviction in respect of the Rs. 30,000 and in respect of the "Cash and Bank Balances," but c held that there had been no wilful false statement in respect of the "agents' balances including branches."

The appellants then applied under ss. 435/439, Criminal P. C., to the Chief Court of Oudh and the matter came before the Hon'ble Bennett J. in revision, who gave judgment on 10th August 1943.¹ The learned Judge saw no reason to interfere with the decision of the Courts below on the item "Cash and Bank Balances," but felt some difficulty in regard to the item of Rs. 30,000 contribution and re- d f rained from expressing any definite view thereon. Before Bennett J. for the first time points were taken on behalf of the appellants as to the interpretation of the Constitution Act in respect of which the learned Judge granted a certificate under S. 205 of the Act. On 13th August 1943, the appellants lodged a petition of appeal to this Court based on the questions of interpretation of the Constitution Act and a supplementary petition on 19th August 1943, to be heard by this Court on the merits.

It was not easy to gather exactly what were "the substantial questions of law on the interpretation" of the Constitution Act which were raised and argued in the Court below

in respect of which the certificate under S. 205, Constitution Act, was granted, or whether they were the same as those submitted to this Court. This appears to be a case in which considerable ingenuity has been expended to discover some arguable points on the interpretation of the Constitution Act in order to obtain a certificate under S. 205 and thereby lay the foundation for an appeal on merits to this Court.

Be this as it may, the arguments submitted were as follows: (i) that by virtue of the provisions of S. 100 and List I, items 37 and 42, of Sch. 7, Constitution Act, insurance and offences against Insurance Law are wholly f within the legislative sphere of the Central Legislature and no Provincial Legislature has power to make laws in respect thereof; (ii) that by virtue of S. 49 (2) the executive authority of a Province is limited to matters with respect to which the Legislature of the Province has power to make laws; (iii) that accordingly the executive authority of the Province has no power to institute or take part in proceedings in connexion with offences created by legislation of the Central Legislature; (iv) that the Central Legislature has no power to put the control of the institution of such proceedings under a provincial officer g such as the Advocate-General of the Province, as the executive authority of the Province does not extend to such subjects; (v) that S. 107, Insurance Act, indicates that no proceedings are to be instituted except by the Superintendent of Insurance, an officer of the Central Executive, or by a private individual, and that in the section the word "person" cannot be construed so as to include a Provincial Government, because even if a Provincial Advocate-General can properly be appointed as the controlling authority, he cannot sanction proceedings to be instituted by a Provincial Government as that would be to autho- h rize it to take action in a sphere to which its executive authority does not extend.

That legislation in respect of insurance and the creation of new offences in respect of insurance come exclusively within the legislative powers of the Central Legislature by reason of the provisions referred to is no doubt true. But we are wholly unable to follow how S. 49 (2), Constitution Act, prohibits the ordinary executive machinery of a Province being put into action in respect of offences created by central legislation unless there be an express prohibition in the legislation itself. *Prima facie*, if a new criminal offence is created by central legislation, it is the right, if not the duty, of everyone to

1. Reported in ('44) 31 A. I. R. 1944 Oudh 147 : 211 I. C. 220 : 1943 O.W.N. 339, Raghuba Singh v. Emperor.

a secure the enforcement of that addition to the criminal law of the land in the ordinary way. There is no force in the suggestion that merely because an offence is created by an enactment of the Central Legislature, operating in the exclusive legislative sphere of the Central Legislature, the provincial authorities responsible for enforcing criminal law are incompetent to prosecute or initiate prosecutions for such offences.

b It may of course be that the enactment of the Central Legislature may expressly limit initiation of proceedings to officials of the Central Executive or, as here, may require the previous sanction of some other person or authority before proceedings can be commenced in respect of such an offence. It is suggested that it is ultra vires for the Legislature to appoint an officer of the Provincial Government as the person to give that sanction. In our judgment, s. 124 (2), Constitution Act, clearly enables the Central Legislature to confer such a power or impose such a duty on an officer of a Province.

c It follows that in our judgment there can be nothing ultra vires in a Provincial Government taking steps to secure the enforcement of the law in respect of offences created by the Insurance Act or in the Advocate-General of the Province being specified in the Act as the person to control the initiation of proceedings under the Act. Nor would there be any difficulty on this ground in holding that s. 107 might authorize the Advocate-General to sanction proceedings to be initiated by his Provincial Government, or some one on behalf of that Government. Whether on other grounds s. 107 authorizes a sanction by the Advocate-General in favour of a Government, as distinguished from an individual person, is another question and arises on the merits. In our judgment there is no substance in any of d the points raised on the construction of the Constitution Act.

Turning now to the questions on the merits, on which the Court allowed counsel to be heard on behalf of the appellants, the first point raised by counsel for the appellants was that the proceedings in which the appellants had in fact been convicted had been initiated by the Public Prosecutor at Lucknow without the previous consent of the Advocate-General of the Province to the initiation by him of those proceedings, that this went to the jurisdiction of the Court to entertain the proceedings, and that the whole proceedings were therefore void and must be quashed. The argument was based on the very general form of the sanction given by the Advocate-

General on 10th December 1941, and it was contended that there was nothing to show on the face of the document to what possible offences or what possible proceedings, either by reference to the sections under which proceedings were to be taken or by reference to identifiable facts or reports, the Advocate-General had addressed his mind before giving his sanction. It was submitted that a general sanction unlimited in the form in which the sanction in this case was given could not be good in law. The further point was taken that a sanction to the institution of proceedings by the Government was not a sanction to the institution of proceedings by a person f within the meaning which should be given to the word "person" in the section.

A study of s. 107 indicates (a) that it applies to the initiation of all proceedings, civil or criminal, under the Act, (b) that the proceedings must be against one or more of the persons indicated, i. e., an insurer or a director, manager or other person mentioned, (c) that no person shall initiate proceedings unless that person has previous to the initiation of proceedings received the sanction to the initiation of such proceedings.

It seems clear therefore that before the sanction is given the Advocate-General must have proposals before him for the initiation g by some person of particular proceedings of a defined nature under the Act against one or more of the specified persons and he must sanction the initiation of those proceedings by that person, and that if proceedings are initiated by some one other than the person to whom the sanction has been given, or if proceedings substantially different from those sanctioned are in fact initiated, the provisions of the section are not complied with and there will be no jurisdiction for a Court to entertain the proceedings.

The section appears intended to protect h insurers, directors, managers and other persons indicated from the initiation of improper proceedings. Unless the protection is to be worthless, they must, if necessary, be entitled to challenge the sanction of the Advocate-General as not having been given to the person who initiates the proceedings or to the particular proceedings initiated against them.

Whilst obviously it is desirable that the sanction should be given in writing and should on the face of it indicate reasonably clearly by statement or references to other documents the necessary matters above set out, it is not possible in our judgment to hold that the section requires any particular form of sanction or even that it should be always in writing.

a What is necessary is that if challenged by a defendant or accused person the plaintiff or prosecutor should be able to establish to the satisfaction of the Court that the requisites of the sanctions as set out above have been complied with in respect of the sanction on which he relies, so that the Court can be satisfied that it has jurisdiction to entertain the particular proceedings before it.

In this case the relevant facts are as follows: (1) The sanction in the general form in which it was given was given on 10th December 1941. (2) The charges on which the appellants were convicted were based solely b on those portions of the first and second complaints which related to the report and balance-sheet of 31st December 1939. (3) From the record it appears that as early as 20th October 1942, application was made on behalf of the accused for the production of the file of the Advocate-General in order that the appellants might see the application for the sanction of the Advocate-General to the prosecution, that in response to an order made on 30th January 1943, the file was duly produced, when it was found that it contained no such application but that the application in question was on a file of the Secretariat. (4) On application to c the Secretariat for the production of their file, absolute privilege was claimed by the Government for the file in question; but an offer was made to the City Magistrate to let him examine it in confidence himself. (5) This the City Magistrate appears to have done, but no opportunity whatever was given to the appellants or their representatives to examine this file, nor was any evidence whatever produced in Court to verify the fact that sanction had been given to the particular proceedings initiated by the Public Prosecutor, although the objection as to the validity of the sanction was pressed in each Court. (6) d The file of the Advocate-General (without the application for his sanction on it) was available in the Courts below and was produced in this Court. (7) From the file of the Advocate-General it appears that — (i) on 6th November 1941, the Advocate-General was under the impression that the documents upon which reliance was to be placed for prosecution were all prepared before the new Act came into force and that he contemplated the prosecution being launched under S. 35 of Act 6 of 1912. Although under the old Act no sanction of the Advocate-General was necessary, yet as the prosecution was being made then and so that the prosecution might not fail on technical grounds he sanctioned the prosecution; (ii) on receipt of some further

note (not on the file) from the Adviser to Government, Home Department, the Advocate-General accorded the sanction to the prosecution of all the three appellants and forwarded the formal consent in the form set out above.

The Advocate-General, though invited to do so could not after this lapse of time throw any further light on the matters as indicated by his file. On the materials before us, it is impossible to be satisfied that the sanction of the Advocate-General was given in respect of any proceedings other than proceedings which might have been brought under the Act of 1912, i. e., in respect of matters arising out f of the first valuation report as at 15th May 1939. The charges on which the convictions were obtained were all in respect of the report and balance-sheet of 31st December 1939. When objection was pressed to the validity of the sanction, it was the duty of the prosecution to establish that proper sanction had been obtained to the proceedings before the Court, so as to give the Court jurisdiction. Unfortunately, it appears not to have been considered in the Court below that the question of sanction might go to the jurisdiction to entertain the proceedings. Both the Court and the prosecution appear to have thought g that the generality of the form of sanction might justify the further charges in respect of the later matters so long as the appellants were not prejudiced in their defence and the Court was of opinion that the appellants had not been so prejudiced. In our judgment this is not the right view to take of the matter. A valid previous sanction is essential to the jurisdiction of the Courts to entertain proceedings. For the reasons indicated, there was in our judgment no valid sanction to the proceedings in which the appellants were convicted.

In the circumstances it is unnecessary to h determine whether the Public Prosecutor who initiated the proceedings was authorized so to do by a sanction to the initiation of proceedings by Government and addressed to the Secretary of Government. But at the same time we desire to make it quite clear that on any individual who initiates proceedings, whether an officer or not of a Provincial Government, lies the obligation to establish that he has a sanction from the Advocate-General for the initiation by him of those proceedings.

It is equally unnecessary and in the circumstances wholly undesirable that we should refer to any other matter on the merits, whether the same was or was not debated before

us. We allow this appeal, direct that the case may be remitted to the Chief Court, and declare that in place of the conviction recorded against the appellants an order should be made quashing all the proceedings for lack of jurisdiction. The appellants will be released from their bail, and the fines, if paid, will be directed to be refunded. We make no order as to costs.

G.N.

*Appeal allowed.***A. I. R. (31) 1944 Federal Court 31***(From Madras)*

17th February 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*T. V. Narasinga Rao and another —*
Appellants

v.

Vysyaraju Surayya Raju and another
— Respondents.

Case No. 4 of 1943.

(a) Madras Agriculturists' Relief Act (4 of 1938), S. 3 (ii) Proviso D—Landholder holding one estate in Madras Presidency as now constituted and other estate in area transferred from Madras Presidency to Orissa Province — Both estates together paying more than Rs. 500 as peshkush — S. 3 (ii) Proviso D applies — S. 7, Regulation (to declare law in force in the Province of Orissa) 1 of 1936 ; Paras 11 and 26, Constitution of Orissa Order 1936 and Para 8, Adaptation of Indian Laws Order, 1937—Interpretation and effect of.

Under S. 3 (ii) Proviso D it is not necessary that the peshkush of not less than Rs. 500 should be payable to the Provincial Government of Madras.

[P 34e]

The object and effect of S. 7 of Regulation 1 of 1936 entitled a regulation to declare the law in force in the Province of Orissa read with Paras 11 and 26 of the Government of India (Constitution of Orissa) Order 1936 was not to enact a law for the area transferred from the Madras Presidency to the Orissa Province but to provide how certain provisions of law assumed to be in force in the transferred areas—obviously under Para 26 of Constitution of Orissa Order 1936—should be interpreted in the changed circumstances. It did not terminate the operation of the Madras Estates Land Act as such in the transferred areas and enact for those areas a new Act in the same terms.

[P 33g,h]

Nor is it correct to say that by reason of the proviso to Para 8 of the Adaptation of Indian Laws Order 1937 all Madras Acts which before the order continued to operate in the areas transferred to the Orissa Province ceased to operate. The purpose of the Proviso was not to terminate the operation of any law in any particular area, but only to provide a particular rule of construction and even that only in respect of "the application of any enactment to Madras." This proviso did for the rest of the Madras Presidency what S. 7 of the Regulation 1 of 1936 did for the transferred areas, the underlying assumption in both cases being that the pre-existing laws continued to operate as before, subject to the rule of

construction enacted by the Regulation and by Para. 8 of the Order in Council respectively. The Madras Estates Land Act therefore continued to operate *proprio vigore* in the areas transferred from the Madras Presidency to the Orissa Province in spite of their transfer. The words "landholder of an estate under the Madras Estates Land Act" in S. 3 (ii) Proviso D therefore are applicable as well to an estate in the areas transferred from the Madras Presidency to the Orissa Province as to an estate which remained in the area now constituting the Province of Madras.

[P 34b,c,d]

Consequently where a landholder holds one estate within the province of Madras and other estate in the areas transferred from the Madras Presidency to the Orissa Province and the two estates taken together pay more than Rs. 500 as peshkush the Proviso D to S. 3 (ii) will apply and the landholder will be excluded from the benefits of the Act. [P 32b; P 34e] f

(b) Adaptation of Indian Laws Order (1937), Para 8 Proviso—Applicability.

The proviso to Para 8 can affect only what is contained in Para 8. The proviso therefore can affect only laws in force before 1st April 1937 because it is only those laws that are dealt with by the opening words of Para 8.

[P 34b,c]

(c) Madras Estates Land Act (1 of 1908) — Applicability—Word "Madras" in title of Act—Relevancy of.

The word "Madras" in the expression "Madras Estates Land Act" is only a part of the description of the Act and does not bear on the "application of the enactment."

[P 34c]

(d) Orissa Money-lenders Act (3 of 1939) — Act coming into force after filing of plaint — Relief under Act claimed before High Court in appeal—That further facts will have to be found is no reason for refusing relief.

Where the Act came into force after the filing of the plaint, and relief under the Act was claimed in appeal before the High Court, relief cannot be refused merely on the ground that further facts will have to be found if the party claiming relief is otherwise entitled to it.

[P 34h]

N. Rajagopala Iyengar (with A. S. Raghava Rao) instructed by Ganpat Rai, Agent —
for Appellants.

*Sir Alladi Krishnaswami Aiyar, Advocate-General, Madras (with Sardar Raghbir Singh and C. Sambasiva Rao) instructed by S. P. Varma—*for Respondent 1.

h

Spens C. J. — This appeal raises a short point turning on the construction of a clause in the Madras Agriculturists' Relief Act, 1938. That enactment made provision for the relief from indebtedness of persons comprehended in the definition of "agriculturist" in S. 3 (ii) of the Act. Out of the general scope of this definition, certain classes of persons were excluded by four provisos. The fourth of these provisos, numbered D, excluded any person who was

"a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion any sum exceeding Rs. 500 is paid as peshkush or any sum exceeding Rs. 100 is paid as quit-rent, jodi, kattubadi, poruppu or the like, or is a janmi under the

ⁿ Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue to the Provincial Government."

The appellants (father and son) are mortgagors who had executed a mortgage bond in favour of respondent 1 on 27th March 1929, securing repayment of a sum of Rs. 26,000, with compound interest at 14 annas per cent. per month, with yearly rests. The security comprised three items of property, namely, a house in Berhampore town, a village named Kumari in Kurla estate, Aska Taluk of the then Ganjam District, and a village named Tharlipeta, situate in the Tekkali Taluk, also included in the Ganjam District at that time.

^b The appellants, as owners of Kumari and Tharlipeta, are "landholders" of "estates" and it has not been disputed that if both the "estates" are taken into account, the appellants will be excluded from the definition of "agriculturist" by reason of proviso D above set out, because the two estates taken together pay more than Rs. 500 as peshkush.

It however happened that when Orissa was constituted into a separate Province in April 1936, the old Ganjam District of the Madras Presidency was divided into two parts, one portion being retained in the Madras Presidency and tacked on to the Vizagapatam District, the other portion being incorporated in the Orissa Province. The position now is that Kumari which pays more than Rs. 500 by way of peshkush has been included in the Orissa Province and Tharlipeta which pays a peshkush of less than Rs. 500 continues to be part of the Madras Presidency. The Madras Agriculturists' Relief Act became law on 22nd March 1938, but there was no similar legislation in Orissa till June 1939. This suit was instituted on 3rd March 1939, in a Subordinate Judge's Court in the Madras Presidency.

^c Appellant 1 who was the sole plaintiff (his sons being impleaded as defendants) prayed for a redemption decree on the taking of accounts between him and the mortgagee; and he claimed that the accounts should be taken not on the basis of the terms of the bond, but in accordance with the provisions of the Madras Agriculturists' Relief Act.

^d It was contended on behalf of the appellants that to exclude a person by reason of proviso D to the definition of "agriculturist" in the Act, two conditions must co-exist, namely, that the estate to be taken into account must be an estate situate within the Madras Presidency and that a peshkush of not less than Rs. 500 must be payable to the Provincial Government of Madras. A case like the present does not seem to have been

present to the mind of the Legislature. And as a matter of reason or policy, it is difficult to see why the Legislature should have thought of treating a person who owned two estates within the Province differently from one who owned two estates of which one was situate within the Province and the other in a neighbouring Province. The only question therefore is what is the effect of the language employed by the Legislature. It was recognised by counsel for the appellant that his contention as to the peshkush being payable to the Government of Madras could not receive support from the words "to the Provincial Government" at the end of proviso D, because the intervening words "jodi," "kattubadi," "poruppu," etc., might include payments to landholders and not to the Government and as a matter of grammar it would therefore be impossible to tack on the words "to the Provincial Government" to the words relating to "peshkush." It was nevertheless contended that that result must be reached, because cl. (a) of the definition speaks of "land in the Province of Madras" and of the assessment being made by the Provincial Government. This does not seem to us to warrant the inference which we were asked by the appellants to draw. Clause (a) of the definition is the enabling provision, but the provisos are only in the nature of disabling or excluding clauses. A person must no doubt possess agricultural or horticultural land in the Province of Madras before he can at all become entitled to claim the benefit of the Act. But his *prima facie* claim on the ground of the possession of such property might, as shown by provisos A, B and C, be excluded even on account of his possession of properties outside the Province of Madras. The scheme of the provisos is that certain classes of persons are, by reason of their general financial position or the nature of the interest they possess in landed property, outside the category of those whom it was the policy of the Legislature to relieve by the provisions of the Act. The payment of peshkush exceeding a certain amount, like the payment of kattubadi or poruppu exceeding a certain amount was merely taken as a measure of the status or financial position of the payer; and for this purpose, it would make no difference whom the payment was made to. It may even be argued with some plausibility that the use of the words "to the Provincial Government" at the end of proviso D and their absence after the words "paid as peshkush" in the middle of the proviso justifies the inference that in the latter case it was not intended to take into account only

a the amount of peshkush payable to the Madras Government.

The main argument in support of the appeal therefore was that unless the estate to be taken into account was situate within the Madras Presidency as now constituted, its owner could not be held to fall within the description of a "landholder of an estate under the Madras Estates Land Act, 1908" in the proviso. It was contended that only an estate which was governed by the Madras Estates Land Act in 1938, when the Madras Agriculturists' Relief Act was enacted could be comprehended by these words and that we must therefore take into account only the b Tharlipeta estate in the present case. A possible answer to this contention may be that the word "under" in the expression "under the Madras Estates Land Act" only means "as defined in;" in this view, the reference to that Act would only be a way of describing the property and need not necessarily imply that the estate should be governed by the provisions of that Act. It is however unnecessary to base our conclusion on this ground. It was admitted on behalf of the appellants that the Madras Estates Land Act was even now in force in the areas transferred to the Orissa Province from Madras and that Kumari was therefore governed by that Act. But it was argued that the Act was not *proprio vigore* in operation in the transferred territory and that therefore the Kurla estate could not be an estate included in the words of proviso D. It will be convenient to refer to a few statutory provisions and orders before examining this contention.

Section 289, Constitution Act, provided for the formation of the Province of Orissa and the incorporation therein of such areas separated from the Presidency of Madras as might be specified in an Order in Council. Under d sub-s. (2) of that section, the Order in Council may contain provisions with respect to the laws which, subject to amendment or repeal by the Provincial or, as the case may be, the Federal Legislature, are to be in force in any part of Orissa. The Constitution of Orissa Order, 1936, came into operation on 1st April 1936. While transferring certain areas from the Madras Presidency to the Orissa Province, para. 26 of that Order provided that the provisions of the Order should not be deemed to have effected any change in the territorial application of any enactment, notwithstanding that that enactment was expressed to apply or extend to the territories for the time being under a particular administration. If the matter had stood here, there could be little

doubt that the Madras Estates Land Act would have continued to operate *proprio vigore* in the transferred areas in spite of their transfer to the Orissa Province. The order however contains another provision (para. 11) in the part relating to the transitional period, that is, the period between 1st April 1936, and 1st April 1937. Paragraph 11 states that the provisions of S. 71, Government of India Act (meaning the Act of 1915), shall apply to the whole of Orissa and Regulations may be made thereunder accordingly. Under this power, the Governor-General in Council made Regulation 1 of 1936, entitled a Regulation to declare the law in force in the Province of Orissa. f This Regulation terminated the operation of certain Madras Acts in the transferred areas, but as regards other enactments, it made the following provision by S. 7:

"Subject to the provisions of Paras. 16 and 17 of the Government of India (Constitution of Orissa) Order, 1936, all enactments, other than enactments repealed by this Regulation, made by any authority in British India and all notifications, orders, etc., which were immediately before, the first day of April 1936 in force in any of the areas comprised in the Province of Orissa shall, in their application to such areas, be construed as if references therein by whatever form of words to the authorities, territory or Gazettes mentioned in col. 1 of Sch. 1 were references to the authorities, territory or Gazettes respectively mentioned or referred to opposite thereto in col. 2 of the said Schedule."

In the schedule, item 3 (a) directs that "the Presidency of Madras" must be construed as referring to "the areas separated from the Presidency of Madras and forming part of the Province of Orissa." It has been contended on behalf of the appellants that the result of this Regulation, read in the light of Para. 11 of the Orissa Order in Council, was to terminate the operation of the Madras Estates Land Act as such in the transferred areas and to enact for this area a new Act in the same terms. We are unable to accede to this contention. Paragraph 11 of the Order in Council must be read along with Para. 26 and reading the Regulation in the light of these two provisions, it is reasonably clear that its object and effect was not to enact a law for the transferred areas, but to provide how certain provisions of laws assumed to be in force in the transferred areas—obviously under Para. 26 of the Order in Council—should be interpreted in view of the changed circumstances.

It was next argued that the proviso to Para. 8 of the Adaptation of Indian Laws Order, 1937, had a material bearing on the case. The paragraph is in the following terms:

“In any Indian law in force immediately before the commencement of this order, any reference by name or description to any territory shall, unless the contrary intention appears or unless it has been, or is by this order, otherwise expressly provided, be construed as a reference to the territory which bore that name or answered to that description at the date when the enactment containing that name or description came into operation.”

The proviso says :

“that in the application of any enactment to Madras, Bombay, Bihar or the Central Provinces references in that enactment to Madras, Bombay, Bihar or the Central Provinces, as the case may be, shall be construed as exclusive of so much of those Provinces respectively as was separated therefrom on the constitution of the Provinces of Orissa and Sind.”

Two contentions were founded on this proviso : (1) that after the promulgation of this order (which came into operation on 1st April 1937), all Madras Acts which theretofore continued to operate in the transferred areas ceased so to operate, and (2) that the word “Madras” used in any subsequent Madras enactment like the Agriculturists’ Relief Act could only refer to the Madras Presidency exclusive of the transferred areas. The second contention does not seem to us to be correct in that broad form. Being only a proviso to what is contained in the main portion of Para. 8, the proviso can affect only laws in force before 1st April 1937, because it is only those laws that are dealt with by the opening words of Para. 8. Further, the word “Madras” in the expression “Madras Estates Land Act” is only a part of the description of the Act and does not bear on the “application of the enactment.” And the first contention does not seem to be warranted by the language of the proviso. Its purpose is not to terminate the operation of any law in any particular area, but only to provide a particular rule of construction and even that only in respect of “the application of any enactment to Madras.” It appears to us that this proviso did for the rest of the Madras Presidency what S. 7 Regn. 1 of 1936 did for the transferred areas, the underlying assumption in both cases being that the pre-existing laws continued to operate as before, subject to the rule of construction enacted by the Regulation and by Para. 8 of the Order in Council respectively.

We accordingly think that the words “landholder of an estate under the Madras Estates Land Act, 1908,” occurring in proviso D to the definition of “agriculturist” in the Madras Agriculturists’ Relief Act, 1938, are applicable as well to an estate in the areas transferred from the Madras Presidency to the Orissa Province as to an estate which remained in the area now constituting the Province of Madras. The learned Judges of the High

Court at Madras were therefore right in holding that the appellants were excluded from the benefit of the Madras Agriculturists’ Relief Act, 1938.

It is stated in the judgment of the High Court that the only contention urged in the appeal related to the claim to relief under the Madras Agriculturists’ Relief Act. We were however told that a claim was also made for relief under the Orissa Moneylenders’ Act, as per ground No. 9 in the memorandum of appeal to the High Court. As we have already stated, the Orissa Act was passed only in June 1939, and no relief on the basis thereof could have been claimed in the plaint. The Advocate-General of Madras who appeared for the contesting respondent admitted that the contention based on the Orissa Act was mentioned by counsel for the appellant when he opened the appeal before the High Court, but he added that the contention was not persisted in when he pointed out certain objections to the sustainability of the claim. He was however not prepared to say that the contention was abandoned. Before us, he mentioned three *prima facie* objections : (1) that the question whether the contesting respondent was a moneylender within the meaning of the Orissa Act might have to be tried as a question of fact; (2) that Orissa Act made provision only for cases where a moneylender was suing as a plaintiff, which is not the case here; and (3) that the relevant section in that Act was framed only as a direction to the Court not to award more than a certain amount by way of interest and that the Orissa Legislature could give such a direction only to Courts situate in that Province and not to Courts situate in other Provinces. As we propose to remit the case to the High Court for a consideration of the questions arising under the Orissa Act, we do not wish to say anything that may seem to prejudice the issue or prejudice either side. We required the Advocate-General to mention his objections only to see whether they were so obviously well-founded as to make a remand unnecessary. As regards the second and third objections, we are not satisfied that there may not be answers which should at least be considered by the Court whilst the possibility that it might be necessary to have further facts found could not be allowed to deprive the appellants of their rights under the Orissa Act, if otherwise they should be found entitled thereto. In a redemption suit, the accounts between the parties have to be taken once for all and their rights declared and it will not be just to de-

deprive the appellants of an opportunity of putting forward their claim under the Orissa Act. If necessary, it will be for the High Court to direct the Court of first instance to try any issues of fact that this aspect of the case may be found to involve.

It was suggested before us that the appellants' claim to relief under the Orissa Act might once for all be heard and decided by this Court. This did not seem to us to be the appropriate course to adopt. It would deprive us of the benefit of a judgment of the High Court on the point and, as above indicated, it might be necessary in a particular view to direct a trial of questions of fact. We accordingly set aside the decree of the High Court and remit the case with a direction that the High Court shall hear and determine the appellants' claim to relief under the provisions of the Orissa Money-lenders' Act and pass such further decree or order as may seem to it appropriate, in the light of the conclusion that it may come to on that question. The appellants have failed on the only point which they pressed before the High Court; and for the omission of the High Court to deal with the question raised under the Orissa Act, the appellants are themselves to blame. They must accordingly pay the costs of respondent 1 in this appeal.

G.N.

Order accordingly.

A. I. R. (31) 1944 Federal Court 35

(From Madras)

17th February 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Rajagopalan and another—Appellants*

v.

Emperor.

a Case No. 60 of 1943.

(a) Penal Code (1860), Ss. 302 and 149—Conviction under S. 302 read with S. 149—Appropriate sentence.

It cannot be said that in case of a conviction under S. 302 read with S. 149 the appropriate sentence in all cases must be transportation for life. The question of sentence must in each case depend upon the facts of the case. Where it is found that the accused, though they were among the rioters some of whom in pursuance of the common object of the unlawful assembly as at that stage constituted, caused the death of the deceased, had themselves taken no part in the assault upon the deceased the lesser sentence of transportation for life may be appropriate. As it was found that the accused were among the seven or eight persons who had inflicted the large number of injuries which the deceased received the sentence of death in all the circumstances of the case was held appropriate. [P 36b,c]

Penal Code —

('40) Ratanlal, Page 755; Page 761 Note "Punishment."

('36) Gour, Page 1030, Notes 3428, 3429.

(b) Federal Court — Appeal — Inferences of fact by lower Court — Interference with by Federal Court.

It is not the ordinary practice of the Federal Court to interfere in appeal with the inferences of fact drawn by the lower Court. [P 38a]

Ch. Ramditta Mall (with M. C. Sridharan)
instructed by Naunit Lal, Agent —

for Appellants.

Sir Alladi Krishnaswami Aiyar, Advocate-General, Madras (with N. Rajagopala Iyengar)
instructed by Ganpat Rai, Agent —

for Respondent.

Sir Brojendra Mitter, Advocate-General of India (with H. K. Bose)
instructed by K. Y. Bhandarkar, Agent — for the Governor-General in Council.

Zafrulla Khan J. (*Spens C. J., concurring.*) — During the early hours of the morning of 20th September 1942, a large number of persons stated to be between sixty and seventy, including the two appellants here, armed with deadly weapons, marched to the salt factory at Kulasekharapatnam, inflicted injuries upon the guards and peons, secured their persons, stole a couple of guns and set fire to one of the sheds. Thereafter most of them departed. At that stage an Assistant Inspector in charge of the factory appeared on the scene with a rifle to which a bayonet had been attached. He had apparently no cartridges with him, but proceeded to chase away such of the rioters as were still within the compound of the factory with the help of the bayonet, inflicting one or two injuries which were not of a serious character. While he was thus engaged, a score or so of the rioters who had gone out of the compound rushed back into the compound, and seven or eight of them, including the appellants, set upon him with their weapons and inflicted altogether sixteen injuries upon his person, several of them serious, as the result of which he died on the spot.

Twenty-two of the rioters were put up before the Special Judge of Tinnevely for trial under the provisions of Ordinance No. 2 of 1942, on charges of rioting, causing mischief by fire, dacoity and murder. Several of them were convicted of various offences, the appellants being convicted, among other offences, of murder. They were sentenced in respect of that charge to death. Their appeal to the Madras High Court was dismissed, and they have come up to us on appeal on a certificate under S. 205, Constitution Act.

The constitutional questions raised in the case are concluded by our judgment in *Piarc*

a *Dusadh v. Emperor* (Case No. 35 of 1943).¹

On the merits, counsel for the appellants confined his submission to the question of sentence. It was contended that the appellants could be held guilty of murder only by virtue of the provisions of S. 149, Penal Code, and that in a case like that a sentence of transportation for life was more appropriate than the sentence of death. On behalf of the Crown it was urged that the case of the appellants fell within the purview of S. 34, Penal Code. In the view that we take, it is unnecessary to decide whether S. 34 would or would not apply to the facts as found by the High Court. We are unable to accede to the contention that in case of a conviction under S. 302, Penal Code, read with S. 149, the appropriate sentence in all cases must be transportation for life. The question of sentence must in each case depend upon the facts of the case. Had there been a finding that the appellants, though they were among the rioters some of whom in pursuance of the common object of the unlawful assembly as at that stage constituted, caused the death of the Assistant Inspector, had themselves taken no part in the assault upon the deceased, there might have been some force in the suggestion that, the lesser sentence would meet the ends of justice in their case. There is no such finding in this case. On the contrary, the finding is that the appellants were among the seven or eight persons who inflicted the large number of injuries which the deceased received, though the High Court did not go so far as to accept that part of the evidence which indicated the nature of the injuries that the appellants had actually inflicted. Having regard to all the circumstances of the case as disclosed in the evidence, we are not disposed to hold in the case of either of the appellants that the sentence of death is inappropriate.

d It was suggested with regard to appellant 1 that there was doubt whether he had actually inflicted any injury upon the deceased at all, inasmuch as the evidence on this part of the case is that he cut and stabbed the deceased (one witness stating that he did so with an aruval), whereas he was alleged to have been armed with a gun. The evidence however discloses no such conflict. Appellant 1 is alleged to have been armed with a gun during a meeting that was held under his presidency at some distance from the salt factory, in which it was decided to march to the factory and to commit the riot. The

assault upon the deceased took place towards the close of the incidents of that morning, and it might well be that during the interval appellant 1 had exchanged the gun for an aruval or other cutting instrument. No attempt was made during the course of the cross-examination to discredit that part of the testimony of the witnesses who stated that appellant 1 had cut and stabbed the deceased. The witnesses were on this point unanimous. The appellants were in our opinion rightly convicted of the offence of murder and the death sentence is appropriate. As no other point was sought to be raised before us, the appeal is dismissed.

Varadachariar J.—I feel some difficulty in sustaining the sentence of death imposed on accused 1. His counsel did not challenge the finding that the two appellants were ‘amongst those who actually chased Mr. Loane when he was bayoneting the rioters inside the compound of the factory.’ The word “chased” is perhaps apt to mislead. All that the evidence shows is that these persons ran from several directions towards the spot where the Assistant Inspector was chasing and bayoneting some of their comrades. The question then is, under what provision of law is accused 1 to be convicted with reference to the murder of Mr. Loane.

The Special Judge had no difficulty in convicting him under S. 302, Penal Code, because he accepted the evidence of P. Ws. 1, 2, 4 and 5 who deposed that accused 1 was one of those who cut and stabbed the deceased. P. W. 5 specifically stated that accused 1 cut the deceased with an aruval (a big curved knife). This evidence was criticised before the High Court with some force, on behalf of the appellants. It was pointed out that these witnesses who had themselves been injured and had been tied up with ropes and left to roll on the ground at a spot not less than 40 feet away from where the Assistant Inspector was being attacked could not have observed which amongst a crowd of about 20 persons surrounding the deceased directly inflicted cuts or injuries on him. It also appears from the evidence that about this time the hut which had been set fire to had more than half burnt down and there was no other light in a dark night. In view of this criticism, the learned Judges observed, rightly, if I may say so, as follows:

“It may be that having regard to the fact that the persons who chased Mr. Loane were 20 in number, these witnesses were not able to see the particular accused specified by them actually cutting and stabbing him. But there can be no doubt that these witnesses saw the accused specified by them among the

¹ *Reported in* (‘44) 31 A. I. R. 1944 F. C. 1 : 211 I. C. 556 : 23 Pat. 159 (F.C.).

persons who chased Mr. Loane and presumed that they participated in the actual attack."

This being their opinion on the direct evidence connecting accused 1 with the murder, the learned Judges had to deal with the argument urged with reference to Ss. 34 and 149, Penal Code. On this, they say:

"Mr. Jayarama Iyer would have us hold that at the worst appellants 1 and 2 could be held guilty of murder only in virtue of S. 149 and not S. 34, Penal Code, and he urges that in this view the lesser sentence should be awarded. We are unable to accept this contention. Having regard to the probabilities of human conduct, everyone who chased Mr. Loane cannot but be reasonably considered to have shared the intention to kill him."

I understand this observation to imply that if the case had to be dealt with as one falling under S. 302 read with S. 149, Penal Code, the learned Judges would not have been prepared to confirm the death sentence. They were obviously dealing with the case as one falling under S. 34. I do not therefore think that we shall be justified in affirming the sentence of death independently of the question whether the case falls within S. 34 or only under S. 149. Even with reference to the distinction adverted to in the judgment just delivered by my Lord and my learned brother as to the practice in awarding sentence in cases falling under S. 149, it would not be unimportant to ascertain whether accused 1 was only among those who were said to have run to the spot where the Assistant Inspector was bayoneting some of their comrades or also himself took part in the assault upon the deceased.

There is this noticeable distinction in the evidence between the case against accused 2 and the case against accused 1, viz., that both before the assault on the deceased and after the assault on the deceased, there is specific evidence that accused 2 was armed with a hatchet and it was also the prosecution case that it was accused 2 that cut P. W. 2 on the head with a hatchet. As regards accused 1, there is no specific evidence that he carried any other arm except a gun, though it is not clear at what stage of the proceedings he carried this gun. From the medical certificate relating to the wounds on the deceased, it is not possible to say that any of the wounds are likely to have been inflicted by accused 1, if he had only a gun and it is nobody's case that he fired the gun at any time. When the learned Judges of the High Court have not relied on the direct evidence of P. Ws. 1 to 5 to the effect that accused 1 stabbed the deceased or cut him with an aruval, I do not think that those very statements can be relied on as proving that defendant 1 carried an aruval or other cutting instrument; nor would

it be right to treat the matter as one in respect of which the burden of proof lay on accused 1, because this is not a case in which he was relying on any of the general exceptions or special exceptions or provisos. It is also not without some significance that accused 1 is not mentioned by any witness as having inflicted any injury on the peons P. Ws. 1 to 5. I am therefore unable to draw the inference that accused 1 must have taken some part in the acts which resulted in the death of the Assistant Inspector and without such an inference it will be difficult to bring the case within S. 34, Penal Code.

Even as regards the question of "common intention," I am not at all sure that the learned Judges of the High Court were justified in assuming that those who chased Mr. Loane "did so to wreak vengeance." The position was that after the shed had been set on fire, the crowd was dispersing in various directions and most of them had gone out of the compound of the salt factory. It was at this stage that Mr. Loane appeared on the scene and chased and bayoneted some members of the crowd who were actually running away. If at that stage some other members of the crowd who were on the point of dispersing went to the spot where their comrades were being attacked, it was quite likely, as the learned Judges also recognised, "that their main object was to rescue their comrades." But they follow this up with the remark,

"the conclusion that they intended to effect that object by killing Mr. Loane is irresistible, as they must have realized that they could not achieve that object otherwise."

I am not satisfied that this does not go too far. The scattering mob very probably acted only on an impulse to go and see what was happening to their comrades and it seems too much to impute to them sufficient knowledge or a common intention that they could or should be rescued by killing the Assistant Inspector. Our attention was drawn to the observations of the Judicial Committee in 52 Cal. 197.² That judgment proceeds on the footing that the common intention to kill the postmaster was clearly established and the act of the accused whose conviction was challenged was also proved beyond doubt, namely, that he had fired at the postmaster, though the shot missed and the postmaster was killed by a shot fired by another of the co-accused. There was accordingly no difficulty in holding that the case was covered by

2. (25) 12 A. I. R. 1925 P. C. 1 : 85 I. C. 47 : 26 Cr. L. J. 431 : 52 Cal. 197 : 52 I. A. 40 (P. C.), *Barendra Kumar Ghosh v. Emperor*.

a S. 34, Penal Code. The discussion was as to the result of its application. Here, the common intention of the crowd and some "act" on the part of accused 1 have both to be inferred from the fact that the Assistant Inspector was murdered and that the accused was one of the crowd who ran to the place where the deceased was chasing some of the rioters.

The question however is bound up with inferences of fact with which it is not the ordinary practice of this Court to interfere and, as my Lord and my learned brother think that the death sentence was justified, b I leave the matter there, with this expression of my doubt.

G.N.

*Appeal dismissed.***A. I. R. (31) 1944 Federal Court 38***(From Patna)*

6th March 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Sahdeo Gosain and another — Appellants*
v.*Emperor.*

Criminal Appeal No. 1 of 1944.

c (a) Criminal trial—Evidence — Identification — Riot—Witness not naming accused A in evidence at trial but merely picking him out as one of rioters while identifying accused in dock whom he had named in his evidence—Evidence of witness is of no value against A.

Where the witness had not named the accused A in his evidence at the trial as a person already known to him who had participated in the riot, but had merely picked him out as one of the rioters while identifying those accused persons in the dock whom he had already named in his evidence as participants in the riot, the evidence of the witness against the accused A is of no value whatever. [P 38g; P 39a]

d (b) Criminal P. C. (1898), S. 164 — Witness not naming accused in his statement under S. 164 — Statement of witness against accused at trial is of no value.

The failure of the witness to mention the name of the accused in his statement recorded under S. 164 robs his subsequent statement against the accused made at the trial (nearly four months later) of all value. [P 39f]

Cr. P. C. —

('41) Chitaley, S. 164, N. 7, Pt. 10.

*Bhabananda Mukerjee (instructed by Sumair Chana Jain Raizada, Agent)—for Appellants.**Mehdi Imam (instructed by S. P. Varma, Agent) — for the Crown.*

Zafrulla Khan J.—On 14th August 1942, a large crowd raided the Ghogha railway station on the East Indian Railway, burnt the records and destroyed or damaged the furniture and telephone equipment. Ten persons were put on trial in respect of this occur-

rence before the Special Judge, Bhagalpur, under Ordinance 2 of 1942. Eight of them were convicted and were sentenced to various terms of imprisonment. Seven of the convicts, including the two appellants before us, preferred appeals to the High Court at Patna. The appeals of five of the convicts were allowed and they were acquitted. The two appellants, whose appeals were dismissed by the High Court, have further appealed to this Court on a certificate under S. 205, Constitution Act.

The constitutional questions raised in the appeal are concluded by our judgment in *Piare Dusadh v. Emperor* (Case No. 35 of 1943.)¹ On the merits, it was contended that on the criterion adopted by the High Court with regard to the reliability of the prosecution evidence in the case, the appellants are entitled to an acquittal. Of the nine witnesses examined on behalf of the prosecution with reference to the occurrence itself, only two, P. W. 1 and P. W. 3, were able to identify any of the accused persons at the trial. The High Court found, however, that the testimony of neither of these two witnesses could be implicitly relied upon, and that it would not be safe to maintain the convictions, except where the testimony of one of these witnesses was corroborated by that of the other. This test the High Court thought was satisfied in the case of the two appellants before us, Sahdeo Gosain and Sitaram Gosain, and their convictions were accordingly confirmed.

As regards Sahdeo Gosain, it was pointed out that P. W. 3 had not named him in his evidence at the trial as a person already known to him who had participated in the riot, but had merely picked him out as one of the rioters while identifying those accused persons in the dock whom he had already named in his evidence as participants in the riot. It was urged that as P. W. 3 had not identified Sahdeo Gosain at any test identification parade, his pointing him out in the dock as one of the rioters was of no value even as corroborative evidence of what P. W. 1 might have stated against him. The learned Judges of the High Court were of the opinion that the memorandum of the evidence of P. W. 3 made by the Special Judge was not clear as to whether the witness had named Sahdeo Gosain or had merely identified him in the dock by sight. We are unable to appreciate the difficulty experienced by the learned Judges, as the memorandum appears to us to be perfectly clear on the point. The witness named four of the accused persons as those whom during

1. Reported in ('44) 31 A. I. R. 1944 F. C. 1 : 211 I. C. 556 : 23 Pat. 159 (F. C.)

a the course of the riot he had identified among the rioters. He stated that they were present in the dock and then proceeded to the dock to identify them. The memorandum then records, "witness picks out Sahdeo and says that he saw this accused also in the mob." This can only mean that while identifying the accused persons whom the witness had already named, he pointed to Sahdeo and said that he had also been among the rioters. There is nothing else in the memorandum which casts any doubt on this matter. As against Sahdeo therefore the evidence of this witness is of no value whatever.

b Our attention was also invited to the evidence of P. W. 4, the station master at Ghogha. He stated that he had witnessed all the incidents of the riot but was unable to identify anyone, as he was a new man in the locality. In cross-examination he admitted that he knew Sahdeo Gosain by sight, as he kept a shop near the station, though he did not know his name. As this witness did not state that he had seen Sahdeo Gosain among the rioters, the doubt with regard to this appellant's complicity in the riot is further strengthened.

c As regards Sitaram Gosain, it was urged that though P. W. 1 did mention his name at the trial as one of the rioters, he had not mentioned his name in his statement recorded under S. 164, Criminal P. C., on 18th August 1942, only four days after the occurrence. On this point all that the learned Judges of the High Court have observed is :

"As regards Sitaram Gosain the criticism is that though P. W. 1 has named him in Court he did not name him in his examination before the Magistrate under S. 164, Criminal P. C., though the accused have brought it out in cross-examination of the investigating officer that Sitaram had been named by P. W. 1 before the police."

d It was argued on behalf of the Crown that the last part of this sentence disposes of the criticism set out in the first part. We are by no means certain that that is so. The learned Judges do not even state whether the statement made by P.W. 1 to the police was before or after his examination under S. 164, Criminal P. C., much less as to how the fact that he had named Sitaram Gosain before the police explains his failure to mention his name before the Magistrate. Both statements appear to have been recorded on the same day, but there is no material on the record which would enable us to determine which was made first. Besides, under the provisions of S. 162, Criminal P. C., a statement made to the police during the course of the investigation can be used only for the purpose of contradicting a

prosecution witness and except in that connexion cannot be used for any other purpose.

We have examined the statement of P.W. 1 recorded under S. 164, Criminal P. C., and find that it relates to the incidents of 14th August as well as to certain incidents of 15th August. In connexion with both these occurrences, the witness mentioned the names of the same eight persons whom he had identified on each occasion and he mentioned them in the same order. The statement is a detailed one and its examination leaves no doubt in our minds that the omission of Sitaram's name was not a slip of memory on the part of the witness. It was suggested on behalf of the appellants that his statement to the police was made after his statement to the Magistrate and that Sitaram's name may have been introduced in it in answer to leading questions put to him by the investigating officer. Be that as it may, the failure of the witness to mention Sitaram's name in his statement to the Magistrate robs his subsequent statement against Sitaram made at the trial nearly four months later of all value.

This leaves against each of the appellants only the uncorroborated testimony of one witness, which in the circumstances of this case, the learned Judges of the High Court were not prepared to regard as sufficient to support a conviction. We are satisfied that the complicity of neither of the appellants in the incidents of 14th August 1942 has been established beyond reasonable doubt. We allow their appeal and declare that in place of the order of the High Court there shall be substituted an order directing their acquittal and immediate release.

G.N.

Appeal allowed.

A. I. R. (31) 1944 Federal Court 39

(From Madras)

17th February 1944

SPENS C. J., VARADACHARIAR
AND ZAFRULLA KHAN JJ.

R. Subbaroyan and others — Appellants
v.

Emperor.

Case No. 57 of 1943.

(a) Special Criminal Courts (Repeal) Ordinance (19 of 1943), S. 4—Before completion of review of case under S. 8 of Ordinance 2 of 1942 Ordinance 19 of 1943 coming into force—Case falls under S. 4 of Ordinance 19 of 1943.

Where before the completion of the review of the case under S. 8 of Special Criminal Courts Ordinance 2 of 1942 Ordinance 19 of 1943 came into force, the case falls under S. 4 of Ordinance 19 of 1943 with the result that the proceedings had

a before the Special Judge must be treated as void and the case must be deemed to be transferred to the appropriate Court under that section for inquiry and trial in accordance with the provisions of the Criminal P. C. : ('44) 31 A.I.R. 1944 F. C. 1, *Rel. on.*

[P 40d]

(b) Special Criminal Courts Ordinance (2 of 1942), S. 8 — Expression "proceedings"— Meaning of — One of several convicts tried together sentenced to seven years imprisonment or severer punishment — Review is obligatory under S. 8 not merely in respect of such convict but in respect of whole case.

The expression "proceedings" in S. 8 comprises the whole of the proceedings before a Special Judge and not merely the case or cases of the convict or convicts sentenced to seven years imprisonment or a severer punishment so that where in any such proceedings any one of several convicted persons tried together is sentenced to death, or to transportation for life, or to imprisonment for a term of seven years or more, a review becomes obligatory under S. 8 (a) not merely in respect of such convicted person, but in respect of the whole case. [P 40f,g; P 41a]

Ch. Ramditta Mañ (with M. S. Venkatarama Ayyar) instructed by Naunit Lal, Agent — for Appellants.

Sir Alladi Krishnaswami Aiyar, Advocate-General, Madras (with N. Rajagopala Iyengar) instructed by Ganpat Rai, Agent — for the Crown.

Sir Brojendra Mitter, Advocate-General of India (with H. K. Bose) instructed by K. Y. Bhandarkar, Agent — for the Governor-General in Council.

c **Spens C. J.** — Eight persons, including the four appellants before us, were tried under the provisions of Ordinance 2 of 1942, by the Special Judge for the Presidency town of Madras at Chingleput, on charges of criminal conspiracy to commit various offences and also on charges of substantive offences. The trial resulted in the conviction of the appellants, who were sentenced to rigorous imprisonment ranging from three to five years and of one Ramaratnam who was sentenced to rigorous imprisonment for seven years. The judgment of the Special Judge was pronounced on 11th May 1943. The proceedings before the Special Judge were by virtue of the sentence passed on Ramaratnam, subject to review under S. 8 (a) of the Ordinance. Before the review was completed, Ordinance 19 of 1943 came into force. We have held in *Piarc Dusadh v. Emperor* (Case No. 35 of 1943)¹ that a case like this fell within the purview of S. 4 of that Ordinance, with the result that the proceedings had before the Special Judge must be treated as void and the case must be deemed to be transferred to the appropriate Court under that section for inquiry and trial in accordance with the provisions of the Criminal Procedure Code.

1. Reported in ('44) 31 A. I. R. 1944 F. C. 1 : 211 I.C. 556 : 23 Pat. 159 (F. C.).

What actually happened in this case was that the convicted persons preferred appeals under S. 3 (2) of Ordinance 19 to the Madras High Court, with the result that Ramaratnam was acquitted and the appeals of the others were dismissed. The High Court granted a certificate under S. 205, Constitution Act, and the case of the appellants is now before us on appeal.

It was urged on behalf of the Crown that S. 8 (a) of Ordinance 2 of 1942 was applicable only to the case of Ramaratnam, and that the cases of the appellants were governed not by S. 4 but by S. 3 (2) of Ordinance 19, and that we could accordingly entertain their appeals and dispose of them finally. It was contended that though the proceeding before the Special Judge in respect of all the eight accused persons was a single trial, as soon as the convictions were recorded the proceeding with respect to each of them became in law a separate proceeding for the purposes of S. 8 (a) of Ordinance 2, and that a review was obligatory only in respect of the proceeding relating to Ramaratnam; the proceedings relating to the appellants not being subject to review at all. We are unable to accede to this contention. In our judgment, the expression 'proceedings' in S. 8 comprises the whole of the proceedings before a Special Judge, so that where in any such proceedings any one of several convicted persons tried together is sentenced to death, or to transportation for life, or to imprisonment for a term of seven years or more, a review becomes obligatory under cl. (a) of the section, not merely in respect of such convicted person, but in respect of the whole case.

If the contention advanced on behalf of the Crown were to be accepted, the result in this case would be that with regard to Ramaratnam the proceedings had before the Special Judge and the judgment of the High Court on appeal must be treated as void and his case must be deemed to be pending before the appropriate Court under S. 4 of Ordinance 19, while the cases of the appellants must be disposed of finally by us. They were all tried together on charges of criminal conspiracy, and one of the contentions raised in the grounds of appeal on behalf of the appellants is that as the result of the acquittal of Ramaratnam by the High Court and the discharge or acquittal of three of the original eight accused by the Special Judge, vital links in the chain of the conspiracy have been knocked out, so that the charge of conspiracy against the appellants must fail on that ground alone. It is obvious that that contention could not be finally disposed of by us so long as the matter

a of the guilt of Ramaratnam was still the subject of judicial determination. We mention this merely to reinforce our view that 'proceedings' in S. 8 of Ordinance 2 must be construed as meaning the whole case and not merely the case or cases of the convict or convicts sentenced to seven years' imprisonment or a severer punishment.

The result is that the appeal is allowed and it is declared that in place of the order of the High Court confirming the convictions, there shall be substituted an order directing further proceedings in the case to be taken in accordance with the provisions of S. 4 of Ordinance b 19 of 1943.

G.N.

Appeal allowed.

A. I. R. (31) 1944 Federal Court 41
(From Madras : ('42) 29 A. I. R. 1942
Madras 539)

6th March 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULL KHAN JJ.

*Maharani Gurucharan Kaur of Nabha
and another — Appellants*

v.

*Province of Madras and others —
Respondents.*

Case No. 7 of 1943.

(a) Master and servant—Liability of Government for acts of its officers.

The Government cannot be held liable for the improper conduct of public servants unless those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it.
[P 44b,c,d]

(b) Government of India Act (1935), S. 270 (1)
—Protection under—Scope of—Mistake of fact
—D. S. P. instructing by telephone Police Sub-Inspector to prevent Maharaja from boarding train at station K — Sub-Inspector misunderstanding instructions and preventing with aid of constables Maharani from boarding train at K — Sub-Inspector and constables held entitled to protection of S. 270 (1) as acts done by them purported to be done in execution of their duty (Per Spens C. J. and Varadachariar J.; Zafulla Khan J. dissenting).

The instructions to the police from the Deputy Superintendent of Police were to go over to station K and to prevent certain Maharaja from leaving that station. The fact, however, was that it was not the Maharaja but his wife the Maharani who had reserved first class compartment at station K to board the Express which was due to arrive. The Maharani was awaiting the arrival of the train in her own car which was placed in the railway compound. On arrival of the train the Police Sub-Inspector acting under a misunderstanding of the instructions that he was to detain the Maharani, not only prevented the Maharani from boarding the train but also got the only gate of the railway compound closed by posting

two constables near it. It was only after some time that the gate was opened and the Maharani allowed to go wherever she pleased :

Held (Per Spens C. J. and Varadachariar J.) that the benefit of S. 270 (1) could be claimed even by an officer who had acted under a mistaken view as to his duty, whether the mistake be one of fact or one of law if only he honestly believed that he was acting in the discharge of his duty. The word "purporting" in S. 270 (1) would be rendered nugatory if the section were limited to acts justified or authorised by law. The question whether the acts complained of purported to be done in execution of duty was substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances. As the Police Sub-Inspector believed, however mistaken that belief was, that he had been instructed to detain the Maharani and honestly thought that it was his duty to obey those instructions he was entitled to protection under S. 270 (1). No suit against him was therefore maintainable without the sanction of the Provincial Government. The case of the constables clearly fell within S. 270 (1) : *Case law discussed.* [P 45fg; P 46a,b,c,h]

(Per Zafulla Khan J.)—No doubt the question as to the meaning of the words "act purporting to be done in the execution of his duty as a servant of the Crown" in S. 270 (1) is substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances. But the view that the words were wide enough to cover the case of an officer who had acted under a mistaken view as to his duty, whether the mistake be one of fact or one of law, if only he honestly believed that he was acting in the discharge of his duty, if interpreted literally would be found to be too widely stated. The mistake of the Sub-Inspector occurred not in the execution of what he had correctly understood to be his duty, but in his imagining that a direction had been issued concerning the Maharani when in fact it had been issued concerning the Maharaja. The correct rule in cases of mistake of fact would be that for the purpose of determining whether an act done bona fide in pursuance of a mistake of fact would be covered by S. 270 (1) the true state of affairs must be deemed to have been what it was mistakenly supposed to be. That is to say, in order to determine whether the language of the sub-section applied to the case of the Sub-Inspector and the constables, it must be assumed that the Deputy Superintendent of Police had in fact directed the Sub-Inspector to prevent the Maharani from boarding the train. The effect of the mistake under which it was alleged the Sub-Inspector was labouring, could not be stretched further to bring his acts and those of the constables within the ambit of the sub-section. Nobody had any lawful authority to direct that the Maharani should be prevented from boarding the particular train or indeed from travelling by any other train or means which she might choose to travel by. That being so, there could be no basis for any assumption on the part of the Sub-Inspector that he had any lawful authority to prevent the Maharani from boarding the train. He must be presumed to possess some knowledge of the duties and authority of a police officer. On no construction which he could reasonably place upon the limits of his lawful authority could he assume that he had authority to restrain the Maharani from boarding the train. Nor was there anything in what the Deputy Superintendent of Police was alleged to have communicated to him, which could have led him to believe that the former himself had any authority to

a interfere with the movements of the Maharani. Therefore, even if the Sub-Inspector and the constables had done nothing more than prevent the Maharani from boarding the train, their acts could not be said to be covered by the language of S. 270 (1). Nor could their acts in wrongfully confining the Maharani inside the compound be described as purported to be done in the execution of their duty. The Sub-Inspector's order to the constables to close the gate of the compound was manifestly unlawful and without any authority. In carrying out that order they could not be held to be acting or to be purporting to act in the execution of their duty as servants of the Crown. Section 270 (1), therefore, afforded as little protection to them as to the Sub-Inspector. [P 48e,f; P 49b,c,d,e; P 51a]

b *B. B. Tawakley (with Raghubir Singh) instructed by R. S. Narula, Agent — for Appellants.*
Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras (with N. Rajagopala Iyengar) instructed by Ganpat Rai, Agent — for Respondents.

Spens C. J. (*Varadachariar J. concurring*).— This appeal arises out of a suit for damages for false imprisonment instituted by the appellants against the Government of Madras and four of its police officers. The incident complained of happened on 13th January 1937, at Kodaikanal Road, a station on the South Indian Railway. The appellants are mother and daughter; as there is no separate case on behalf of appellant 2 who is a minor, appellant 1 will be referred to as the appellant in the course of this judgment. Kodaikanal Road is about 52 miles from Kodaikanal, a hill station in South India. The headquarters of the district is Madura, about 20 miles further south from Kodaikanal Road on the South Indian Railway. Madura is the headquarters of defendant 2 who at all material times was the District Superintendent of Police. Defendant 3 was a Sub-Inspector belonging to the Madras Railway Police Service and defendants 4 and 5 are police constables of the same service. A brief narrative of the events that led up to the incident of 13th January 1937, will help to make the contentions raised in the case intelligible.

The appellant is the widow of the ex-Maharaja of Nabha. By an order of the Government of India, passed under the Bengal State Prisoners Regulation (3 of 1818), the ex-Maharaja was required to stay at Kodaikanal and had been so staying since 1928. He was apparently kept under close supervision for some time, but after a few months this was relaxed. The Government of India however wanted

“a watch to be maintained by the police at any railway station where the detinue is likely to entrain and steps to be taken to ensure his re-arrest in the event of his absconding.”

He was also forbidden to be absent from his residence at night (Ex. 7 (c)). By Ex. 7, dated 24th August 1928, the Inspector-General of Police, Madras, acting under instructions from the Government of Madras (to whom necessary directions had been conveyed by the Government of India) informed the District Superintendent of Police, Madura, of the Government's decision to restrict the movements of the ex-Maharaja of Nabha to the Kodaikanal municipal area. The same information was once again conveyed to defendant 2 in June 1936 (*vide* Ex. 7 (a)).

The appellant who had been staying with her husband at Kodaikanal desired to go to Madras early in 1937 and necessary arrangements were made by her Secretary (P. W. 6 in the case) for reserving accommodation for her in the “Trivandrum Express” (a train proceeding to Madras from the South) on 13th January 1937. That afternoon, the Station-house Officer at Kodaikanal, acting under the erroneous impression that the ex-Maharaja was arranging to proceed to Madras, sent a telegram (Ex. 4) to defendant 2 in the following terms: “Ex-Nabha Raja departing to Madras Spencer Hotel with family in car M. D. 2037.” This is said to have been received by defendant 2 at Madura at 6-30 P. M. In view of the possibility of the ex-Maharaja having left Kodaikanal by that time, defendant 2 decided to take steps to prevent his boarding the train at Kodaikanal Road railway station. The “Trivandrum Express” was timed to leave Madura at about 7 P. M. and to reach Kodaikanal Road a few minutes after 8 P. M. Defendant 2 accordingly gave a call on the telephone to the railway police staff at the Madura station platform and as defendant 3 answered, defendant 2 attempted to instruct him to proceed by that train to Kodaikanal Road and there prevent the ex-Maharaja boarding the train. To the details of this conversation we shall advert later. In all probability, defendant 3 caught or understood the instructions only vaguely and indistinctly, as the platform was noisy and his knowledge of English very poor and he had to catch the train in a hurry as it was about to leave. During the journey between Madura and Kodaikanal Road, he saw that one of the compartments in the train had been reserved for the Maharani of Nabha. Connecting this with the indistinct impressions that he had received from the telephone message at Madura, he seems to have made up his mind that the instructions given to him by defendant 2 must have related to the Maharani. That he believed that defendant 2's instruc-

a tions related to the Maharani and acted on that footing and did not intend to act in violation or in excess of those instructions is placed beyond doubt by the telegram, Ex. O, which he sent to defendant 2, two hours later, from Kodaikanal Road. He there speaks of having "detained the Maharani as per the orders" of defendant 2.

b When the train arrived at Kodaikanal Road, defendant 3 informed P. W. 6, who was waiting on the platform, that he had instructions to prevent the Maharani boarding the train. She was at that time sitting in her car within the railway compound, expecting to be called to the train by her Secretary (P. W. 6) after her luggage had been placed in the compartment reserved for her. It is unnecessary to refer here to the details of the conversation that is said to have taken place between defendant 3 and P. W. 6 or between P. W. 6 and the appellant. The train was delayed for a few minutes beyond the scheduled time, apparently as a result of this discussion. After it had left, defendant 3 sent the telegram, Ex. O, already referred to and its concluding words "advise as what to do" are significant in their bearing on the appellant's contention on the case of false imprisonment. On receipt of Ex. O, defendant 2 sent the reply telegram, Ex. 3 :

"Your orders were to detain Raja and not Maharani. Maharani may proceed anywhere and you should afford any assistance which the Maharani may require."

c By this time, defendant 2 had been informed by a second telegram (Ex. 6) sent by the Station-house Officer, Kodaikanal, that the ex-Maharaja had "returned on sending family." Exhibit 3 is said to have been received by defendant 3 at Kodaikanal Road at 9.45 p.m. The appellant states that from the time of the arrival of defendant 3 at Kodaikanal Road station till the time that this telegram was received, the only gate through which she and her car could have gone out of the railway station compound remained closed under the orders of defendant 3 and that defendants 4 and 5 had posted themselves at that gate with a view to prevent her egress. When the gate was opened, she left by car for Trichinopoly, about 85 miles further north, in a vain attempt to catch the Trivandrum Express at that station. The appellant claimed that the above acts of defendants two to five had no legal justification and that as they had led to a complete deprivation of her liberty for the time being, they constituted false imprisonment. She further claimed that the Government of Madras—whom she impleaded as

defendant 1—was also liable for damages, since the other defendants had invaded her right to freedom in the course and as part of their official employment, alleging it to be within the scope of their official authority.

The defendants filed written statements, more or less on the same lines so far as the facts were concerned. As a matter of law, defendants 1 and 2 stated that the plaintiffs had no cause of action against them. All the defendants denied that there had been anything in the nature of false imprisonment. They asserted that acting under the supposed order of defendant 2, defendant 3 had only prevented the appellant boarding the train at Kodaikanal Road, that he never gave orders to defendants 4 and 5 to close the gate of the compound and that the gate was in fact not closed. It was added that except that the plaintiffs were prevented from going by that train, they were at absolute liberty to go anywhere they liked and that this was made clear to them even in the first instance. Defendants 4 and 5 also denied that they closed the gate or were ordered by defendant 3 to close the gate. A plea that the suit was not maintainable without the sanction of the Provincial Government under S. 270 (1), Government of India Act, 1935, and a further plea of limitation, either under Art. 2, Limitation Act, or under S. 53, Madras District Police Act, were also taken. It is unnecessary to refer to the other pleas.

The trial Court as well as the High Court accepted the appellant's version of the incident as substantially true, including the allegation that the gate of the railway compound within which the appellant was staying in her car was closed under the orders of defendant 3 and that defendants 4 and 5 posted themselves there under his orders. Without repeating the reasons given in their judgments, we may say we concur in this finding. The learned Subordinate Judge further held that in view of the attitude and declarations of defendant 3 these acts amounted to false imprisonment, but the learned Judges of the High Court thought otherwise. They say,

"plaintiff 1 must have thought that she was confined within the railway fencing where her car was standing and would not be permitted to leave it, if she tried so to do that must have been her feeling from the subjective point of view ; but that would not be enough for us to hold that she was actually confined or imprisoned and not merely restrained from proceeding by the Trivendrum Express. Had there been proof on the record that there was total restraint of plaintiff 1's movements or liberty during the period that she was in her car by the use or threat of force or by confinement, she could be said to have been imprisoned."

a If it were necessary to decide this question, we should have hesitated to concur in this opinion of the learned Judges of the High Court. On the questions of law, both Courts have held that the plaintiffs had no cause of action against defendants 1 and 2 and that the suit was not maintainable against defendants 2 to 5 without the sanction of the Provincial Government under S. 270 (1), Constitution Act. The learned Judges of the High Court also held that the suit was barred by Art. 2, Limitation Act, and S. 53, Madras District Police Act, as it had not been instituted within three months of the incident.

b They granted a certificate under S. 205, Constitution Act, on the ground that the case involved a substantial question of law as to the interpretation of S. 270 (1) of the Act. Hence this appeal.

The case against defendants 1 and 2 can be briefly disposed of. The learned Judges of the High Court based their decision in favour of defendant 1 on two grounds: (1) that defendants 2 to 5 acted in exercise of their "statutory power" and that in such circumstances a person aggrieved by their acts could have no claim against the Government, and (2) that the State could not be held liable for the improper conduct of public servants unless those acts had been done under the orders of the Government or had been subsequently adopted and ratified by it. They also referred to a line of cases in India distinguishing between claims against the Government on the basis of contracts or other business transactions entered into by public servants on behalf of the Government and claims in respect of tortious acts committed in the discharge of governmental functions as a sovereign. There are obvious difficulties in this case in accepting the view that defendants 2 to 5 were discharging a "statutory duty" in their dealings with the appellant. As we however agree with the learned Judges as to the other ground of their decision in favour of defendant 1, it is unnecessary to discuss this aspect of their decision.

a As regards defendant 2 also, we must hold that the plaintiffs have not made out any ground to make him legally liable. We cannot however help feeling that on his own statement that it was not easy to make defendant 3 understand his instructions, defendant 2 would have done better to have taken greater care to make his instructions clear and specific. Some questions in the course of the evidence and some discussion in the judgments in the Courts in Madras have been directed to the ascertainment of the exact words used by

defendant 2 in giving instructions to defendant 3. He naturally said that he was unable to recall the exact words used by him and we are unable to hold that defendant 3 spoke the truth when he said that defendant 2 specifically referred to the Maharani as the person whom he was to prevent from proceeding to Madras. Two of the disputed matters are (i) whether defendant 2 instructed defendant 3 to detain anybody or merely to prevent him from boarding the train and, (ii) whether he used the singular, referring only to the ex-Maharaja or used the plural so as to include in his direction the ex-Maharaja's party as well. In view of the possibilities of legal arguments that were raised by the pleadings in the case as to what would constitute "false imprisonment", defendant 3, instead of pleading failure of memory, insisted that only the word "prevent" was used. But the learned Judges of the High Court have rightly attached some importance to the wording of the telegram (Ex. O) which the Sub-Inspector sent a few hours later from Kodaikanal Road to defendant 2 at Madura. He there reports that he "detained Maharani of Nabha from going by six as per your orders." On his own evidence, defendant 3 was not very well conversant with English and it is quite likely that he was repeating the word "detain" as he heard it on the telephone on the Madura platform. The language of the instructions is even more important with reference to the person or persons asked to be dealt with. Defendant 2 is positive that he mentioned only the ex-Maharaja, but he cannot say whether he added anything like "only" or "alone." It is common ground between him and defendant 3 that defendant 3 had some difficulty in hearing defendant 2's instructions on the telephone. Defendant 2 admittedly referred to the "party" or "family" of the ex-Maharaja as among those intending to proceed to Madras, and if he had not definitely instructed that only the ex-Maharaja was to be prevented from proceeding, it would be no wonder if a person of defendant 3's standing had understood that members of the "party" or "family" were to be likewise prevented, whether the ex-Maharaja was with them or not.

It does not however seem so easy to exonerate defendant 3 from legal liability. As observed by the High Court, defendant 3 cannot rely upon S. 54, Criminal P. C., because the appellant was not charged with or suspected of any offence and there was no requisition to defendant 3 specifying any offence or other cause against the appellant, so as to make it appear to him that the appellant might law-

a fully be arrested without a warrant even by defendant 2. Clause (9) of S. 54 throws a certain measure of responsibility even on the officer to whom the requisition is addressed. We doubt if defendant 3 can take shelter even under S. 21, District Police Act, 1859, because that section only commands obedience to and execution of orders and warrants lawfully issued. In this case there was, in fact, no order or warrant to detain the appellant and none such could have been lawfully issued. It is however unnecessary for us to decide this question, in view of the conclusion that we have come to on the plea raised under b S. 270 (1), Constitution Act.

It was argued on behalf of the appellant that defendant 3 could not claim the benefit of S. 270 (1) as his acts could not be brought within the description "done or purporting to be done in the execution of his duty as a servant of the Crown." It was also contended that as defendant 3 falsely denied having done anything beyond preventing the appellant from boarding the train at Kodaikanal Road, he should not, now that he is found to have gone much farther and improperly detained the appellant within the station compound by getting defendants 4 and 5 to close the gate, be allowed the benefit of a plea under S. 270 (1) in respect of this latter act, as he did not claim it in the written statement. It was said that on his own evidence that he was only asked to "prevent" the appellant from boarding the train at Kodaikanal Road, his acts, in so far as they went further, were clearly in wanton excess of his duty and that such conduct was not protected by S. 270 (1). It was lastly contended that if the instructions given by defendant 2 related only to the ex-Maharaja, it could not be held that defendant 3 was acting in the execution of his duty in detaining the appellant. On the other side, the Advocate-General pointed out that the plaintiffs themselves had alleged in paras. 7 and 17 of the plaint that the acts of defendants 2 to 5

"were purported to be done in their official capacity and in the course, and as part, of their official employment and alleged to be within the scope of their official authority"

and he contended that it was not now open to the plaintiffs to say that the acts complained of were not acts done or purporting to be done by defendants 2 to 5 in the execution of their duty as servants of the Crown. Whatever might have been the position, if the case had been argued on demurrer, before the evidence had been led, we do not feel that it would be proper at this stage to deal with

the question as one to be decided merely on the pleadings. The passage relied on by the Advocate-General from the opinion of Lord Macmillan in 1937 A. C. 139¹ at p. 161 does not seem to treat the allegations in the plaint as concluding the plaintiffs, but only as supporting the conclusion which the House was inclined to come to on the facts. Likewise, we have to deal with the plea of the defendants under S. 270 (1) as a general plea to the whole case of the plaintiffs and to consider whether even on the facts, as we find them, the action of the defendants can be regarded as taken or purporting to be taken in the execution of their duty as servants of the Crown.

Assuming that the acts complained of cannot be regarded as done by defendants 3 to 5 in the execution of their duty, there still remains the other alternative, namely, whether they purported to be so done. The word "purporting" would be rendered nugatory if the section were to be limited to acts justified or authorised by law: *cf.* A. I. R. 1930 Mad. 458² at p. 464; *see also* (1876) 3 Ch. D. 600.³ The interpretation of this provision was discussed at some length in the judgments delivered in 1939 F. C. R. 159.⁴ As observed by one of us there, the question is substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances. English decisions construing similar language in a provision in the Public Authorities Protection Act, 1893, make it clear that the benefit of that statute can be claimed even by an officer who has acted under a mistaken view as to his duty, whether the mistake be one of fact or one of law, if only he honestly believed that he was acting in the discharge of his duty: *see* (1919) 89 L. J. P. C. 1;⁵ (1929) 1 K. B. 419⁶ and (1871) 6 Q. B. 724.⁷ In (1932) 2 K. B.

1. (1937) 1937 A. C. 139 : 105 L.J.K.B. 563 : 155 L. T. 305 : 80 S. J. 753 : 52 T. L. R. 702 : 55 Ll. L. Rep. 343 : 1936-2 All. E. R. 1243, R. & W. Paul, Ltd. v. The Wheat Commission.

2. ('30) 17 A. I. R. 1930 Mad. 458 : 124 I. C. 144 : 59 M. L. J. 501, Wilson v. Nathmull.

3. (1876) 3 Ch. D. 600 : 45 L.J.Ch. 754 : 24 W. R. 844, Dicker v. Angerstein.

4. ('39) 26 A. I. R. 1939 F. C. 43 : 181 I. C. 317 : 40 Cr.L.J. 468 : I.L.R. (1940) Lah. 400 : I. L. R. (1939) Kar. F. C. 132 : 1939 F. C. R. 159 (F. C.), Hori Ram Singh v. Emperor.

5. (1919) 2 Ir. R. 325 : 89 L. J. P. C. 1 : 83 J. P. 113 : 17 L. G. R. 369, Newell v. Starkie.

6. (1929) 1 K. B. 419 : 98 L.J.K.B. 98 : 140 L. T. 236 : 93 J. P. 99 : 27 L. G. R. 53 : 73 S. J. 12 : 45 T. L. R. 75, Scammell & Co. v. Hurley.

7. (1871) 6 Q. B. 724 : 19 W. R. 1110, Selmes v. Judge.

a 595⁸ at p. 602, Du Parc J. expressed a doubt "whether the Act protects a public officer who, while rightly apprehending the facts, takes a mistaken view as to his legal obligations, and executes or intends to execute some function which he has no duty to execute."

It is unnecessary in the view that we take on the facts of this case to determine whether S. 270 (1) will also include cases of officers acting under a mistaken view of law as to their duty. The language of the English statute is not identical with that employed in S. 270 (1), Constitution Act, but we think that the principle of the cases above referred to, in so far as they extend the statutory protection even to officers acting under a mistaken view as to their duty, is equally applicable here. It is true that S. 270 (1), Constitution Act, goes much farther than the Public Authorities Protection Act, in that the former places an aggrieved person at the mercy of the executive government before he can institute a suit even in a civil Court in respect of an alleged misconduct of a public servant, whereas the English Act only provides for a shorter period of limitation and for previous notice to the public officer. But this does not relieve the Court of its duty of giving due effect to the terms of the statutory provision.

c We have already held that defendant 3 must have believed, however mistaken this belief was, that defendant 2 had instructed him to detain the appellant. It is clear from his conduct that he also honestly thought that it was his duty to obey those instructions. It was argued on behalf of the appellant that when, as the evidence shows, defendant 3 declined to accede to the request of P. W. 6 to wire to defendant 2, even while the train was at the Kodaikanal Road Station, so as to get definite instructions from defendant 2, he must be taken to have acted maliciously, so as to disentitle him to the benefit of S. 270 (1).

d The English cases no doubt deny the benefit of the Public Authorities Protection Act to officers who act maliciously or only in "pretended" execution of their duty. It is unnecessary to decide in this case whether the same principle would govern the interpretation of S. 270 (1), Constitution Act, because we agree with the learned Judges of the High Court that the conduct of defendant 3 could not be held to have been malicious or mala fide. In the witness box, he denied that P. W. 6 made any request to him to the above effect and he suggested that he was only

asked if the appellant could go back to Kodaikanal and he replied that she was free to do so. We are unable to believe this version. As the subsequent conduct of the appellant showed, she was eager to go to Madras and it was only natural that, in that situation, the Private Secretary would have asked defendant 3 to obtain definite instructions from defendant 2, especially when there was good reason to think that there could have been no order against the appellant and that there must be some mistake somewhere. The attitude of defendant 3 to that request was only what is usual with most police officers when they imagine that they are carrying out orders and though he has added to his difficulties by his statements from the witness box, we think it would be too much to read into his conduct at the time anything like malice or want of good faith.

A further contention was urged that defendant 3 who belonged to the railway police was under no duty to obey the orders of defendant 2 who belonged to the District Police and that therefore defendant 3 could not be held to have acted in execution or purported execution of his duty. This contention has, in our opinion, no substance. Defendant 3 stated from the witness box that though orders are generally communicated to the officers of the railway police through their own Superintendent, the District Superintendent of Police issues orders directly to the subordinate officers of the railway police when a matter is urgent and that the fact of his having issued such orders is merely communicated to the Superintendent of Railway Police. Defendant 2 and D. W. 7, the Deputy Inspector-General of Police, were examined some days later and no question was put to them in cross-examination to suggest that such was not the practice or the true legal position. Indeed, the practice seems quite natural and probable in view of the scheme of the Police Act and the rules framed thereunder. Though for purposes of administrative convenience, the railway police is classified as a separate unit, it forms part of one and the same general police force with the District Police, and the Police Manual suggests that there should be full and complete co-operation between the two sections of the force. Defendant 3 is accordingly entitled to claim that the suit is not maintainable without the sanction of the Provincial Government. So far as defendants 4 and 5 are concerned, their case clearly falls within S. 270 (1).

The appeal must fail on the grounds so far dealt with and it is not necessary to consider

8. (1932) 2 K. B. 595 : 101 L. J. K. B. 588 : 147 L. T. 336 : 96 J. P. 327 : 30 L.G.R. 349 : 76 S.J. 474 : 48 C. L. R. 517, *Betts v. Receiver for the Metropolitan Police District*.

a the plea of limitation. We wish to guard ourselves against being understood as concurring in the view of the High Court that the suit is barred either by Art. 2, Limitation Act, or S. 53, Police Act.

There is one episode which at this stage has no bearing on the decision of the case, but which, we think, requires a passing notice, as the learned Judges of the High Court have commented on it. Referring to a letter of apology (Ex. R) sent to the appellant by the Deputy Inspector-General of Police, the learned Judges expressed regret "that due advantage was not taken of the Government's
b gesture of goodwill." If this observation was intended to imply any appreciation of the attitude of the Government or any blame-worthiness on the part of the appellant in that connexion, we are unable to concur in it. Defendant 2 no doubt had the courtesy to write a letter of apology (Ex. 8) on 21st January 1937. But he unfortunately thought fit to address the letter in terms which the appellant had been protesting against for at least two years before and the result was that the letter returned to defendant 2 with the envelope unopened. There is thus nothing to show that the appellant was aware of this apology.
c Notice under S. 80, Civil P. C., of the intended suit was given to and received by the Government of Madras in the last week of January and all that appears in the evidence is that early in February the authorities busied themselves with collecting evidence for the suit. (See Exs. 1 and 2 and the cross-examination of D. W. 5 as to his having asked the Deputy Superintendent of Police to make an enquiry and report.) It is true that Ex. R was sent by the Deputy Inspector-General of Police; but this was on 18th August 1937, that is, nearly two months after summons in the suit had been served on the Government. When it
d came to defending the suit, the defendants contended that the suit should have been filed within three months of the incident, but it took more than six months after the incident to send this letter of apology. The averments in para. 19 of defendant 1's written statement would seem to deprive this letter of apology of even such little grace as it might otherwise have possessed. It was probably sent under legal advice, with a view to found a plea on the provisions of S. 53, District Police Act, which says that no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought or if a sufficient sum of money shall have been paid into Court after such action brought. That this must have been the object

of the letter is shown by the defendant's insistence on raising this question by issue 8 in the case. As we have already said, this is however only by the way.

We have carefully considered the question of costs in this appeal. Both in the trial Court and in the High Court, the parties have been directed to bear their own costs. We are however unable to follow the same course here. Whatever might be the grievance of the appellant, her case had been fully considered and examined by two Courts and both of them had concurrently held that the suit was not maintainable. Any further attempt to agitate the question could be made by the appellant only at her own risk and subject to the usual obligations of a litigant who fails in his appeal. The appellants must accordingly pay the respondents' costs of this appeal, only one set.

Zafrulla Khan J. — As I have the misfortune to dissent from the view taken by my Lord and my learned brother on the question whether the provisions of S. 270 (1), Constitution Act, operate as a bar to the maintainability of the suit against defendants 3 to 5, I am under the necessity of stating the grounds of my dissent somewhat fully. The pleadings reveal a good deal of difference between the parties regarding the facts. It is therefore necessary to set out the facts as established by the evidence. At the outset it may be observed that the appellant's late husband never left his house on the afternoon of 13th January 1937, when the appellant left for Kodai-
kanal Road station. There was thus no justification for the telegram sent by the Station-house Officer to defendant 2 announcing that the ex-Maharaja had left for Madras (Ex. 4), and the whole train of unfortunate incidents that followed resulted from a misapprehension which could easily have been cleared up by the exercise of a little care by
h the Subordinate Police Officers at Kodaikanal.

The main controversy between the parties centred round what occurred at the railway station on the arrival of the Trivendrum Express. Defendant 3 stopped the appellant's Private Secretary (P. W. 6) from putting her baggage in the compartment reserved for her and informed him that he had orders to prevent the appellant from boarding the train and to detain her. P. W. 6 told him that they had received no such order and wanted to know whether there was any order in writing. Defendant 3 replied that he had received oral orders over the telephone. P. W. 6 then asked him to put down his own order in writing so that he could show it to the appellant. This

a defendant 3 declined to do. P. W. 6 then went to the appellant who was waiting in her car in the station compound and told her what had happened. She asked him to clear the matter up with the District Superintendent of Police by getting a telegram despatched to him and to somehow arrange for her to travel by the Express. In the meantime, defendant 3 had directed defendants 4 and 5 to close and guard the gate which afforded the only egress from the station compound and they carried out the direction. P. W. 6 asked defendant 3 to send a telegram to the District Superintendent of Police as it was possible that a mistake b had been made, and told him that the station master (P. W. 4) would be requested to detain the train for a short time to enable the appellant to travel by it on receipt of a reply from the District Superintendent. The request was supported by the station master who offered to try to obtain the Controller's orders for the detention of the train. Defendant 3 declined to move in the matter on the ground that his orders were definite. After the departure of the train, P. W. 6 asked him to permit the gate to be opened so that they could now make a move. To this he replied that the appellant having been detained under the orders of the c District Superintendent, she could not be allowed to move till further orders were received from that officer. P. Ws. 4 and 5 suggested that he might obtain further orders by telegram. He then despatched the telegram (Ex. O) to defendant 2, a quarter of an hour after the departure of the train. The reply (Ex. 3) was received an hour later and thereupon he informed the appellant that she was now free to go anywhere she liked.

That the appellant was wrongfully confined by defendants 3 to 5 can on these facts admit of no doubt whatever. On behalf of the respondents no legal justification or excuse was d sought to be urged before us for the wrongful confinement. Counsel for the respondents admitted that if the bar created by S. 270 (1), Constitution Act, could not be availed of by defendants 3 to 5, the appellant would be entitled to recover against them. Section 270 (1), Constitution Act, provides that no proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India before the relevant date, except with the consent of the Governor-General or the Governor of the Province as the case may be. Much argument was addressed to us on the exact meaning of the words "act purporting to be done in the execution of his duty as a servant of the

Crown." I find myself in entire agreement with the majority of the Court that the question is substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances. They go on, however, to express the view that the words are wide enough to cover the case of an officer who has acted under a mistaken view as to his duty, whether the mistake be one of fact or one of law, if only he honestly believed that he was acting in the discharge of his duty.

I feel considerable hesitation in subscribing to that proposition without qualification, as with all respect I consider that if interpreted literally it would be found to state the principle too widely. A Superintendent of Police might direct a Sub-Inspector to take a couple of constables with him and arrest and produce before him X, a perfectly peaceful and law-abiding citizen, whom he proposed to interrogate in order to obtain information which might be useful to him for some private or public purpose, but without disclosing to the Sub-Inspector any ground that would justify X's arrest. If the Sub-Inspector and the constables proceeded to execute these orders, it might be argued on their behalf that they had honestly believed that they were acting g in the discharge of their duty. That the matter might be further complicated by their arresting Y, honestly believing that the orders related to him rather than to X, might in their eyes make no difference to the case. I cannot bring myself to believe that Parliament in enacting S. 270 (1) had in mind a case of this kind which in its essentials is not distinguishable from the case before us. If this section or other similar enactments are held to cover cases like these, the result would be that whatever may be the position with regard to a superior officer issuing an unlawful order, his subordinates executing such an order could h always take shelter behind such provisions, a state of affairs which would amount to putting a premium upon official high handedness and would reduce the rights of the subject to security of life and limb, liberty and the peaceful enjoyment of property to a mockery. A line must be drawn somewhere and it is not suggested by the majority where it should be drawn.

We are in this case concerned only with a mistake of fact. Defendant 2 asked defendant 3 to proceed to Kodaikanal Road station and prevent the ex Maharaja from boarding the Trivandrum Express. On the basis of the information which defendant 2 had received, this was a perfectly lawful order and was well

within the authority of defendant 2. Though defendant 2 was satisfied that defendant 3 had understood his directions correctly (lines 7 and 8, page 78 of the Record) defendant 3 somehow imagined that the person who was to be prevented from boarding the Express was the appellant. Had defendant 3 made no mistake in interpreting the directions of defendant 2, and on arrival at Kodaikanal Road station his inquiries had led him honestly to believe that a certain person present at the platform and seeking to board the train was the ex-Maharaja, and had he proceeded to prevent that person from boarding the train, and it had subsequently transpired that that person was not the ex-Maharaja but somebody else, there might perhaps have been force in the contention that defendant 3's act fell within the purview of S. 270 (1), as an act purporting to be done in the execution of his duty. In this case a mistake occurred not in the execution of what defendant 3 had correctly understood to be his duty, but in his imagining that a direction had been issued concerning Y, when in fact it had been issued concerning X. I venture to think that the correct rule in cases of mistake of fact would be that for the purpose of determining whether an act done bona fide in pursuance of a mistake of fact would be covered by the subsection, the true state of affairs must be deemed to have been what it was mistakenly supposed to be. That is to say, in order to determine whether the language of the subsection applies to the case of defendants 3 to 5, it must be assumed that defendant 2 had in fact directed defendant 3 to prevent the appellant from boarding the train. The effect of the mistake under which it is alleged defendant 3 was labouring, cannot be stretched further to bring his acts and those of defendants 4 and 5 within the ambit of the subsection. What then is the position? Nobody had any lawful authority to direct that the appellant should be prevented from boarding this particular train or indeed from travelling by any other train or means which she might choose to travel by. That being so, there could be no basis for any assumption on the part of defendant 3 that he had any lawful authority to prevent the appellant from boarding the train. He must be presumed to possess some knowledge of the duties and authority of a police officer. On no construction which he could reasonably place upon the limits of his lawful authority could he assume that he had authority to restrain the appellant from boarding the train. Nor was there anything in what defendant 2 is alleged to have communicated

to him, which could have led him to believe that defendant 2 himself had any authority to interfere with the movements of the appellant. Therefore, even if defendants 3 to 5 had done nothing more than prevent the appellant from boarding the train, I would have been reluctant to hold that under the circumstances of this case their acts were covered by the language of S. 270 (1), Constitution Act. But the matter does not rest there. Defendant 2 is quite clear and emphatic that his direction was only to prevent the person concerned from boarding the train. Defendant 3 does not allege any mistake or misunderstanding with regard to this part of the direction. He stated at the trial (line 23, p. 69 of the Record) :

"I understood the District Superintendent of Police's phone at Madura to mean that I should prevent the Maharani from going by train. I did not understand it to mean that I should prevent her from going by car and boarding at any railway station further off." Nothing could be clearer. His case throughout has been that he clearly understood that the direction given to him was merely to prevent the lady from boarding the train. If nevertheless he along with defendants 4 and 5 proceeded to wrongfully confine her, surely it cannot be urged on their behalf that their acts in this connexion purported to be done in the execution of their duty. It was suggested that the language of Ex. O, the telegram which defendant 3 despatched to defendant 2 after the departure of the train, indicated that the direction given to him was to detain the Maharani. I do not think it would be justifiable to pick out that word from the telegram and attach to it its primary connotation. The word was used by defendant 3 to describe something that was in his mind and he alone was in a position to explain what he had meant by it. His explanation is this :

"The District Superintendent of Police used the word 'prevent.' In Ex. O, I used the word 'detained.' That was because I thought both words meant the same thing. (Lines 40 to 42, p. 69 of the Record.)"

Again,

"The word 'detained' in Ex. O means only prevented from going by train. I did not mean by it that I prevented the Maharani from going anywhere or detained her in a place. In that case I would have stated I arrested her. (Lines 30 to 35, p. 67 of the Record.)"

To a person of the little education of defendant 3, "detain" might signify only stop or prevent. The position therefore is that defendant 2 asked defendant 3 to prevent the ex-Maharaja from boarding the train. By the time defendant 3 arrived at the station, he began to imagine that the direction given was to prevent the appellant from boarding the train. This direction, if it had in fact been

a given by defendant 2 would have been neither lawful nor justified, but was in any case limited to prevention from boarding the train. It was so understood by defendant 3. Assuming that if defendants 3 to 5 had done no more than prevent the appellant from boarding the train their acts would have been covered by the language of S. 270 (1), what justification would there be for holding that the section would also cover their entirely unauthorized and high-handed action in wrongfully confining her? It was argued that the fact that defendants 3 to 5 had falsely denied the wrongful confinement, should not operate
b to deprive them of the benefit of S. 270 (1), if the Court came to the conclusion that though the appellant was wrongfully confined, defendant 3 did honestly believe that the direction given to him by defendant 2 was to confine her. But did defendant 3 honestly hold that belief and could the Court so find? The question whether the appellant was or was not wrongfully confined is one, if I may say so, of external visible fact, which has to be determined on the evidence of the eye-witnesses. The questions, what was the direction given by defendant 2, and what was it understood to be by defendant 3, are no doubt equally
c questions of fact, but the second relates to the state of mind of defendant 3 upon which the primary and the best evidence can only be that of defendant 3 himself. True it is that help could also be sought from inferences that might be drawn from his conduct, but even that conduct, so far as it relates to the despatch of Ex. O, has been explained by him consistently with his direct evidence. Nor does it appear to me to follow that if his denial of wrongful confinement was false, his explanation of what he understood he had been directed to do must also be false.

a If I were to attempt to make a reading of the working of defendant 3's mind, the picture would be somewhat like this: He understood defendant 2 to say that the ex-Maharaja and his party were proceeding to Kodaikanal Road station and that he was to prevent the ex-Maharaja from boarding the Trivandrum Express. During his journey from Madura to Kodaikanal Road, he noticed at an intermediate stop that a first class compartment had been reserved for the use of the appellant. On arrival at Kodaikanal Road, he discovered that it was the appellant who was proposing to travel by that train and not the ex-Maharaja. He then imagined that perhaps his instructions were to stop the appellant from travelling by that train, as it would in his then state of knowledge appear to him absurd

to have been told to stop the ex-Maharaja who was nowhere near the scene. Being clothed with a little authority, he arrogated to himself a great deal more, as is unfortunately often the case in this country, and not merely prevented the appellant from boarding the train, but proceeded wrongfully to confine her in the compound of the station for two hours. Knowing that he had no authority for such action and never intending to admit that he had so acted, when the matter came to the notice of his superiors, he not only denied the wrongful confinement himself but also persuaded defendants 4 and 5 to deny it. The wrongful confinement is denied not only in the written statements of defendants 3 to 5, but also in the written statements of defendants 1 and 2. This can be explained only on the hypothesis that defendant 3 had done something that he knew was no part of his duty, was indeed unlawful and high-handed, and the doing of which he dared not admit to his official superiors. This conclusion is strengthened by the refusal of defendant 3 when requested so to do to furnish P. W. 6 with a written order directing the appellant to refrain from travelling by the Trivandrum Express and not to move out of the station compound, which incidentally would have put
9 the question of the nature and scope of the directions given to him by defendant 2 beyond doubt.

This is not conjecture. It is a more legitimate inference from the evidence and the conduct of defendant 3 than the inference that though defendant 2 swears that he asked defendant 3 only to prevent the person concerned from catching the train, he has grossly perjured himself having in fact asked defendant 3 to "detain," i. e., to confine that person, and that though defendant 3 swears that he understood that he was only to prevent the appellant from catching the train, he has equally
13 perjured himself having in fact understood that he was to put her in confinement. In any case, it was for defendant 3 to establish that the direction given to him was to detain, i. e., to confine, the appellant, or at least that he so understood or interpreted the direction. In the face of the sworn denial of defendant 2 that he gave any such direction, and of defendant 3 himself that he received any such direction, I do not conceive it to be any part of my duty to make out a contrary case on their behalf. On his finding, it is not possible to hold that the acts of defendant 3 are covered by the language of S. 270 (1), Constitution Act. His order to defendants 4 and 5 to close the gate of the station compound and

a to mount guard on it was manifestly unlawful and without any authority. In carrying out that order they could not be held to be acting or to be purporting to act in the execution of their duty as servants of the Crown. Section 270 (1) would afford as little protection to them as to defendant 3.

It was conceded on behalf of the respondents that if S. 270 (1) was not applicable to the case, the suit would not be barred by limitation, either under Art. 2 of Sch. 1, Limitation Act, or by virtue of the provisions of S. 53, Madras District Police Act. On the quantum of damages, the appellant's counsel did not ask us for any higher sum than that assessed by the trial Court, viz., Rs. 5000. This was not contested on behalf of the respondents. In my opinion, the appellant is entitled to a decree against defendants 3 to 5 for Rs. 5000 with proportionate costs throughout. But as the majority of the Court have taken a different view, the order of the Court will be as they have proposed.

G.N.

Appeal dismissed.

* A. I. R. (31) 1944 Federal Court 51

(From Calcutta)

27th March 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Governor-General in Council —
Appellant

v.

Raleigh Investment Co., Ltd. —
Respondent.

Case No. 22 of 1943.

(a) Government of India Act (1935), S. 226—
Plea is not to be postponed till decision of case on merits.

A plea under S. 226 is in the nature of a demurrer and it would be anomalous to hold that the decision of such a plea should be postponed till after and be made to depend upon the decision of the case on the merits. [P 54f]

(b) Government of India Act (1935), S. 226—
Scope.

Section 226 is not limited to steps taken in the collection of revenue. It equally applies to the demand or assessment : 4 M. I. A. 353 (P. C.), *Referred.*

[P 55a]

(c) Government of India Act (1935), S. 226—
Bar is absolute—No facts need be found for it.

If the jurisdiction of the Court depends on the existence of certain facts, the jurisdictional or exclusionary provisions will ordinarily be of a qualified character and indicate what facts must be found before the jurisdiction can attach or be excluded. But the bar provided by S. 226 is absolute, if the dispute concerns revenue, taking the word "revenue" in its ordinary sense : ('23) 10 A. I. R. 1923 P. C. 138 ; 4 M. I. A. 353 (P.C.) and ('40) 27 A. I. R. 1940 Bom. 65 (F. B.), *Referred.* [P 55e,f]

(d) Income-tax Act (1922, as amended by Act 7 of 1939), S. 4 (1)—Profits of company earned in India — Dividend income of share-holders is also earned in India — Dividends however passing through several companies—Question of earning dividends will depend on particular facts.

No doubt the profits of a company may not materialise into a dividend for the share-holder till a dividend is declared, but that is different from saying that when the dividend is declared the "source" of the dividend is not the same as the source of the profits made by the company. If the profits of the company during the period in question are for the purpose of taxing the company to be treated as earned here it cannot be said that for the purpose of taxing the share-holders they were earned abroad. The source of income is the same in both cases. No doubt when a dividend is declared it becomes a "debt" for which the share-holder can sue the company, but that is not a picture of the whole transaction. The company can declare dividends only when it has earned profits; the real question therefore is where has the money out of which the dividends are declared been earned? How exactly this question is to be answered when the dividends have passed through more than one company will depend upon the circumstances of each case : (1927) 1 Ch. 107, *Disting.*; (1918) 25 C. L. R. 183 and (1921) 29 C. L. R. 134, *Rel. on* ; Case law discussed. [P 57b,c,f,g,h]

When the attempt is to tax income and not the corpus the question to be considered is the source of that "income" and for that purpose it is legitimate to take into account the place where the business from which the income is derived is in fact carried on and not to treat the situs of the shares in the eye of the law as concluding the matter. [P 59a]

* (e) Income-tax Act (1922, as amended in 1939), S. 4 (1) (c) and S. 4 (1) Expl. — No extra-territorial operation held given—Even if extra-territorial operation is given held it was within legislative powers conferred.

The plaintiff company is a joint-stock company incorporated under the English Companies Act, having its registered office in the Isle of Man, and its main office at England. It has no business premises in India, but holds the bulk of the shares in eleven companies which carry on the business of manufacturing and selling tobacco and cigarettes in India. Two of these companies "rupee companies" are incorporated in India under the Indian Companies Act and have their registered office and business headquarters at Calcutta. The nine remaining companies, the "sterling companies", are registered under the English Companies Act. They are controlled in London, where the Boards of Directors sit, the share registers are situate and dividends are declared. The Boards in London have constituted Boards which are situate in India. The business in India where all profits are made, is managed by the local Boards. The ultimate control lies with the London Boards. No share registers are kept in India. The financial policy of the companies is controlled by the London Boards and in all important matters of business the London Boards are consulted. All the general meetings of the companies are held in England. The registered offices of six of the "sterling companies" are in the Isle of Man and of three others in London; but all the "sterling companies" have offices in London. Dividends from the two "rupee companies" were paid to a representative of the plaintiff-company in Calcutta. The dividends of the nine "sterling companies" were declared by them in England and paid by them in

^a England to the plaintiff-company in England. The dispute relates to the claim of the Indian Government to levy income-tax and super-tax on the dividends paid to the plaintiff by the "sterling companies":

Held that the "source" of the dividends paid to the plaintiff-company by the sterling companies was British Indian and that in making them liable to income-tax on that basis the Indian Legislature is not giving its law any extra-territorial operation.

[P 52f,g,h ; P 53a,b ; P 60b]

Held further that the extent, if any, of extra-territorial operation which is to be found in the impugned provisions (S. 4 (1) (e) and S. 4 (1) Expl.) is within the legislative powers given to the Indian Legislature by the Constitution Act : *Case law discussed*.

[P 62c]

^b (f) Taxing Statute — Benefit received by tax payer is not measure for its legality.

The Legislature is not compelled to measure the taxation by the degree of benefit received in particular cases by the tax-payer. This affects the policy and not the validity of the legislation.

[P 58g]

(g) International law — Revenue law of one country will not be enforced by another country.

It is a rule of Private International law that the revenue laws of one country will not be enforced by the Courts of another country. Likewise, the practical difficulties that may arise in enforcing the extra-territorial provisions of a taxing statute are not by themselves a ground for invalidating them. The pertinent question is whether the particular legislation is authorized by the Constitution Act creating the subordinate Legislature and defining its powers.

[P 60e]

^c (h) Government of India Act (1935), S. 99 (1) (2)—Scope of—Power to legislate is conferred by sub-s. (1)—Power of extra-territorial legislation is not limited to clauses (a) to (e) of sub-s. (2).

^d In the Act of 1935, sub-s. (1) of S. 99 does not use the expression "things within British India", but empowers the Federal Legislature to make laws "for the whole or any part of British India" and the "topics" on which it can legislate are specified in Lists I and III of Sch. 7. This way of dealing with the matter is significant. The lines on which sub-s. (2) of S. 99 has been framed are even more significant. Sub-section (2) of S. 99 is worded not as a provision "conferring power to make laws", but as a provision which assumes that the preceding sub-section is capable of being read as including the power to make laws even in respect of the matters specified in the five cases dealt with in sub-s. (2). That the Federal Legislature's power of extra-territorial legislation is not limited to the cases specified in cls. (a) to (e) of sub-s. (2) of S. 99 appears clearly from entry No. 23 of List I of Sch. 7, relating to "fishing and fisheries beyond territorial waters". It would not be right to derive the power to legislate on this topic merely from the reference to it in the List, because the purpose of the Lists was not to create or confer powers, but only to distribute between the Federal and the Provincial Legislatures the powers which had been conferred by Ss. 99 of 100 of the Act. Nor can the power be inferred from the doctrine of accessory or necessary powers, for, it cannot be said that the other powers conferred on the Federal Legislature cannot be made effective without the right to legislate in respect of fisheries beyond territorial waters. The power so to legislate was understood to have been conferred by sub-s. (1) of S. 99.

[P 61e,f,g,h ; P 62a]

M. C. Setalvad (with G. N. Joshi) instructed by K. Y. Bhandarkar, Agent — for Appellant.
S. M. Bose and S. Chaudhari (with Raghubir Singh and S. Mitter) instructed by P. K. Bose, Agent — for Respondent.

Spens C. J.—This is an appeal, by the Governor-General in Council, from a decree passed by a Special Bench of the Calcutta High Court exercising its ordinary original civil jurisdiction. The decree declared that the words "or, are deemed to accrue or arise" in S. 4 (1) (c) of the Income-tax Act and Expln. 3 to S. 4 (1) of the Act were beyond the law-making powers of the Indian Legislature and were therefore void and had no legal effect, and it directed refund to the plaintiff of a sum of Rs. 4 lakhs and odd paid under protest. The provisions taken objection to by the High Court represent change introduced in 1939 into the income-tax law of India. It was contended on behalf of the Government (i) that the suit was not maintainable, and (ii) that the impugned provisions of the Income-tax Act were intra vires the Indian Legislature.

The plaintiff—the Raleigh Investment Co. Ltd.—is a jointstock company incorporated under the English Companies Act, having its registered office at 13, Athol street; Douglas, in the Isle of Man, and its main office at Egham, Surrey, England. It has no business premises in India, but holds the bulk of the shares in eleven companies which carry on the business of manufacturing and selling tobacco and cigarettes in India. Two of these companies, referred to in the judgments of the High Court as "rupee companies," are incorporated in India under the Indian Companies Act and have their registered office and business head-quarters at Calcutta. The nine remaining companies referred to as the "sterling companies," are companies registered under the English Companies Act. They are controlled in London, where the Boards of Directors sit, the share registers are situate and dividends are declared. The Boards in London have constituted Boards which are situate in India. The business in India, where all profits are made, is managed by the local Boards. The ultimate control lies with the London Boards. No share registers are kept in India. The financial policy of the companies is controlled by the London Boards and in all important matters of business the London Boards are consulted. All the general meetings of the companies are held in England. The registered offices of six of the sterling companies are in the Isle of Man and of three others in London; but all the sterling companies have offices in London.

a The eleven companies were assessed to income-tax and to super-tax on their income during the year 1938-1939 and these taxes have been paid. Dividends were declared by the eleven companies; and, according to statements filed by the plaintiff-company, it received, for the year 1938-1939, a sum of Rs. 75,45,197 as dividend from the eleven companies. Dividends from the two "rupee companies" were paid to a representative of the plaintiff-company in Calcutta. The dividends of the nine "sterling companies" were declared by them in England and paid by them in England to the plaintiff-company in England. The dispute in this case relates to the claim of the Indian Government to levy income-tax and super-tax on the dividends paid to the plaintiff by the "sterling companies."

A brief reference to the scheme of the relevant provisions of the Income-tax Act will help to bring out the points at issue. As is well-known, a large number of companies not registered in British India are doing business in this country and the Indian administration has had to face certain difficult questions in attempting to assess to income-tax and super-tax the profits made by such companies, especially when they carry on their business through the mechanism of another foreign company. The difficulty has been greater in respect of super-tax. In the case of companies, super-tax has, under the Constitution Act, to be regarded as being in the nature of corporation tax. Companies are not assessed to super-tax on a graduated scale like individuals or unregistered firms. The administration accordingly seeks to levy super-tax (properly so-called) on the recipients of the dividends. In the case of income-tax, S. 49-B, Income-tax Act, provides for the recipient of the dividend being entitled to a proportionate deduction of income-tax with reference to the amount of income-tax paid by the company. But as the basis of the levy of super-tax on the company is, as stated above, different from the basis of the levy of super-tax on individuals, no such deduction as is contained in S. 49-B is provided for in respect of super-tax payable on dividends received from companies. Where the recipient of the dividend was resident outside British India, it was held by the Bombay High Court in 1931 in 55 Bom. 734¹ that dividends received by him outside British India from companies doing business in British India but registered in

the United Kingdom and having their share register there could not be assessed to income-tax in British India, under the Indian Income-tax Act, as it then stood. To meet this situation, certain amendments were inserted in the Act in 1939 and these are the provisions now impugned. It having been enacted by S. 3 that the tax shall be charged in respect of "the total income" of the previous year, S. 4 proceeds to define "the total income." In respect of income not "received or deemed to be received in British India" by or on behalf of the assessee, the Act creates a category of "income accruing or arising or deemed to accrue or arise in British India"; and, drawing a distinction in this connexion between persons resident in British India and persons not resident in British India, it provides by cl. (c) of sub-s. (1) of S. 4 that the total assessable income of a non-resident shall include income which accrues or arises or is deemed to accrue or arise to him in British India. By way of amplification of this provision, Explanation 3 to sub-s. (1) enacts,

"that a dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India."

On the basis of the provisions above referred to, the Income-tax Officer proposed to assess the plaintiff-company to income-tax and super-tax for the year 1939-40 on the sum of Rs. 75 lakhs and odd received by it as dividend for the year 1938-39 from the eleven companies doing business in India. To this proposal the plaintiff took exception, on the ground that dividends declared outside British India could not be regarded as income accruing or arising in British India and added that if the Income-tax Act attempted to impose a liability on such dividends, its provisions would to that extent be invalid. The Income-tax Officer overruled the objection and assessed the plaintiff according to the provisions of the Act. He gave credit to the plaintiff for the sum of about Rs. 11 lakhs already paid by the companies as income-tax and charged under this head a further sum of only Rs. 72,047 (due apparently to a small difference in the rates applicable). Under "super-tax" the plaintiff-company was called upon to pay Rupees 3,73,155-13-0, at a flat rate of one anna per rupee (the graduated scale not being applicable, as the plaintiff was also a company). Under the Act, the plaintiff could have appealed against this order and asked for questions of law being referred to the High Court (*vide* S. 66). But the company preferred to pay under protest and filed this suit on the

1. (31) 18 A. I. R. 1931 Bom. 420: 136 I. C. 170: 55 Bom. 734: 33 Bom. L. R. 776, Commissioner of Income-tax v. Goldie.

a original side of the High Court, asking for a declaration in the terms now granted by the decree appealed against and for consequential relief. The Government filed a written statement, objecting to the maintainability of the suit and insisting that the assessment was valid. On both points, the High Court overruled the defendant's contentions, on the first point, by a majority and on the second point, unanimously. There were other pleas raised, but it is unnecessary to refer to them here, as they have not been argued before this Court.

b The only objection to the maintainability of the suit urged before us was based on S. 226, Constitution Act, which runs as follows:

"Until otherwise provided by the Act of the appropriate legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It was contended on behalf of the Government that the present suit fell within the description "matter concerning the revenue" in the above provision. Lodge J. was of the opinion that this objection should prevail; c but the Chief Justice and Mitter J. held that a matter could be held to concern revenue only when the law under which the revenue was claimed was itself valid; and as they came to the conclusion that the relevant provisions of the law were in this case invalid, they were of the opinion that the suit must be held to relate not to revenue, but to an illegal exaction. The learned Chief Justice said :

"In order to decide whether the money has been demanded and paid legally, the Court must first determine whether the impugned legislation is valid or not. The Court is bound to enquire into and decide this matter to ascertain whether it has jurisdiction d or not."

Dealing with the relevant provisions of the Income-tax Act, he said that they constituted a case of the

"Legislature of British India, without specific or apparent authority, stretching out its legislative arm and fiscal hand beyond British India into other countries in an attempt to tax persons and property there not subject to its laws."

Mitter J. described them as a "piece of extra-territorial legislation, not by a supreme or paramount legislature, but by a subordinate legislature." Lodge J. has not discussed this question, but he expressed his concurrence in the opinion of the other two learned Judges on this point. The correctness of the conclusions of the High Court on both the points has been questioned before us in the appeal.

Taking up first the plea based on S. 226, e Constitution Act, we are, with all respect, unable to concur in the view taken by Derbyshire C. J., and Mitter J. on this question. It is true that this section corresponds to a provision enacted more than 150 years ago, in very different circumstances; and it is anomalous to deny to the High Court in its original jurisdiction power to try questions which a subordinate Court and the High Court itself in its appellate jurisdiction are not precluded from trying. When framing the Constitution Act of 1935, it was open to Parliament to omit or change this provision. But it has not done so. The opening words of f S. 226 indicate that the attention of Parliament was directed to the question of the expediency of retaining the prohibition in the old form, but Parliament preferred to leave it to the authorities in India to decide the time when and the form in which the provision should be recast. So long as the provision is there, it is duty of the Court to give due effect to the natural meaning of the words employed. A plea under S. 226 is in the nature of a demurrer and it seems to us anomalous to hold that the decision of such a plea should be postponed till after and be made to depend upon the decision of the case g on the merits.

The learned Judges say that where the law imposing the revenue is itself illegal, a dispute in relation to it cannot be said to concern the "revenue." This argument, if pursued to its logical limits, will prove too much. If even under a valid revenue law a person who is not liable to be assessed is sought to be assessed to revenue, that claim may well be described as an "illegal" claim against him. Again, there may be a dispute between a taxpayer and the revenue authorities as to whether the tax-payer has or has not paid what h was due from him and if on investigation it should be found that he had paid what was claimed as still due, the claim as against him for further payment might well be described as "illegal." If in such cases the Court should be called upon to decide whether the claim was well-founded in law before applying the bar under S. 226, the provision would be practically rendered nugatory. In 4 M. I. A. 353,² the Judicial Committee held that the section would apply to all cases in which "parties bona fide and not absurdly believed that they are acting in pursuance of statutes and according to law." This language will, in our

2. (1846-51) 4 M.I.A. 353 : 6 Moo. P.C. 257 : 1 Sar. 363 (P.C.), *Spooner v. Juddow*.

opinion, apply as much to the Indian Legislature acting in the belief that its enactment is authorized by the Constitution Act as to a subordinate authority in India acting in the belief that his or its action is authorized by the Indian law. Section 226 is obviously not limited to steps taken in the collection of revenue. It equally applies to the demand or assessment.

It is true that in 4 M.I.A. 353,² no question was raised as to the legality of the revenue claim. But the principle enunciated by their Lordships is of general application. Mitter J. thinks that as their Lordships permitted argument on the question whether the quit-rent which was sought to be recovered in 4 M. I. A. 353² was "revenue" or not within the meaning of the section, it is open to the Court, when dealing with a plea under the section, to decide whether the law imposing the revenue is valid or not. With all respect, we think that this inference is not justified. What was argued before their Lordships was a question of interpretation of words and not the very question of right which was in dispute in the proceeding. If, for instance, it could be contended that income-tax could not be included in the meaning of the word "revenue" in the section, the argument would be similar. It might perhaps even be that if the assessment imposed on the plaintiff in this case could not bona fide have been regarded or spoken of as income-tax, the limitation imposed by their Lordships on the application of the section could be invoked. The arguments in the case have certainly shown that the dispute between the parties as to the legality of the claim cannot be regarded as other than bona fide.

Some reliance seems to have been placed by the learned Judges of the High Court on the decision in 50 I. A. 227.³ It is not clear how exactly the learned Judges have used that pronouncement to support their conclusion in the present case; it does not seem to us to throw any light on the question now arising for decision. It turned on the special nature of the relief claimed in that proceeding and there is certainly nothing in that judgment to qualify the principle laid down by their Lordships in 4 M. I. A. 353.² In the only reported case where the application of s. 226 had to be considered on an allegation that the revenue law itself was illegal, a Special Bench of the Bombay High Court held that "before the section can apply, we

must determine that the tax which is challenged is legal." See I. L. R. 1940 Bom. 58.⁴ There is no discussion of the question in that judgment, apparently because the point "was not seriously contested by the Advocate-General" in that case. The authority of that pronouncement does not in any event carry us farther than the considered judgment of the Calcutta High Court in the present case. Mitter J. refers to the analogy of cases where a Court has power to determine what are called jurisdictional facts, if the jurisdiction of the Court depends on the existence of certain facts. In such cases, the jurisdictional or exclusionary provisions will ordinarily be of a qualified character and indicate what facts must be found before the jurisdiction can attach or be excluded. But as we read s. 226, the bar is absolute, if the dispute concerns revenue, taking the word "revenue" in its ordinary sense.

The above conclusion as to the effect of s. 226, Constitution Act, would by itself suffice to justify the appellant's contention that the suit should be dismissed. As the case has however been fully argued before us on the merits and we have come to the conclusion that the appellant's contention must succeed even on the point as to the legality of the assessment, we proceed to deal with it, as it would be embarrassing to the Government in the administration of the income-tax law if we should at this stage dispose of the suit merely on the preliminary ground.

The appellant's argument as to the validity of the impugned provisions of the Income-tax Act comprised two contentions: It was first argued that these provisions were not extra-territorial in their operation. It was also argued that even if they should be found in any degree to operate extra-territorially, that would be no ground for holding them to be invalid, so far as municipal Courts called upon to deal with them were concerned. We are of the opinion that both these contentions are well-founded and must prevail. A third argument was advanced, that in any event so much of the provisions as may seem to operate extra-territorially must be held to be valid on the ground that they were ancillary or incidental to the authorized portion of the legislation and were required to make its exercise effective. This last contention, based upon the authority of the decisions in 1906

3. ('23) 10 A.I.R. 1923 P.C. 138 : 75 I. C. 392 : 50 I.A. 227 : 47 Bom. 742 (P. C.), Alcock Ashdown & Co. v. Chief Revenue Authority, Bombay.

4. ('40) 27 A. I. R. 1940 Bom. 65 : 186 I. C. 817 : I. L. R. (1940) Bom. 58 : 42 Bom. L.R. 10 (F.B.), Byramjee Jeejibhoy v. Province of Bombay.

a A. C. 542⁵ and 1933 A. C. 156,⁶ may be briefly disposed of. The purpose of the impugned provisions is obviously to increase the extent of the income which is to be taxed for the benefit of the Indian Exchequer. If such extension should by itself be held to be unauthorized, it is difficult to see how the extension could be held to be necessary for the effective exercise of the power to tax so much of the income as might fall within the authorized limits. The cases relied on bear no true analogy.

In support of the first contention, namely, that the impugned provisions are not extra-territorial, reliance was placed upon the words in Explan. 3 to S. 4 (1) limiting the assessability of a dividend paid without British India "to the extent to which it has been paid out of profits subjected to income-tax in British India." It was contended that the Legislature had thus attempted to tax only such income as had its source in British India and that this was clearly within the territorial jurisdiction of the British Indian Legislature. Our attention was drawn to the observations of Lord Hershell in (1889) 14 A. C. 493,⁷ at p. 504 where the existence within any particular country of "that from which the taxable income is derived" is spoken of as a "territorial limitation" quite as much as the residence there of the person whose income is to be taxed. Strong reliance was also placed on certain decisions of the High Court of Australia, where dealing with provisions similar to the impugned provisions of the Indian Act or provisions of even wider import, the High Court of Australia has held that they were not invalid on the ground of extra-territorial operation. On behalf of the respondent, it was contended that in a case like the present, the source of income to the plaintiff-company could not be regarded as situate in British India. It was argued that though the sterling companies might earn their profits by business carried on by them in British India, there was no connexion between the plaintiff-company and the earning of these profits and that the plaintiff-company derived its income only in England where the dividends were declared by the sterling companies. In

support of this contention, reliance was placed on some of the observations of Tomlin J. (as he then was) in (1927) 1 Ch. 107.⁸ The judgment of the High Court seems to be mainly based upon these observations. The learned Chief Justice states that the effect of the impugned provisions is

"to make liable to tax in British India foreign money measured in a foreign currency paid in a foreign country by one foreign company to another foreign company in discharge of a debt which arose and was payable in that foreign country."

Mitter J. also emphasises the position that the dividend which accrues to a share-holder of a company is income which is quite distinct from the income of the company in which the shares are held, even when the whole of the share capital of the company is held by that share-holder. The Australian decisions have not been discussed by the Chief Justice, possibly because the reports and the relevant statutes were not available in Calcutta. Mitter J. observes that in two of them, there appears to have been no attempt to tax the non-resident foreigner directly and he adds that in any event the tests laid down in those decisions cannot be followed here, because "the Indian Constitution is materially different from the Australian Constitution."

The question, in its present form, does not appear to have arisen directly for decision in England; in view of the difference between the Indian and the English income-tax laws in their basic scheme, it is scarcely likely to arise. In (1927) 1 Ch. 107,⁸ a certain aspect of it had to be considered incidentally and even that only with reference to certain provisions of the Australian income-tax law. The question has, however, been considered in several decisions of the High Court of Australia where, conditions of business being in some respects similar to the conditions obtaining in this country, the provisions of the income-tax law also bear some resemblance to the provisions with which we are concerned here. Two of the Australian decisions, (1918) 25 C.L.R. 183⁹ and (1921) 29 C. L. R. 134,¹⁰ are practically on all fours with the present case. In both the cases, the Court was confronted with the very argument that has been advanced on behalf of the plaintiff here, namely, that though the source of the company's income was Australian, that of the share-holder's was not, because, in the

5. (1906) 1906 A. C. 542 : 75 L. J. P. C. 81 : 95 L. T. 314 : 22 T. L. R. 757, *Attorney-General for Canada v. Cain*.

6. ('33) 20 A. I. R. 1933 P. C. 16 : 143 I. C. 91 : 1933 A. C. 156 : 102 L. J. P. C. 6 : 148 L. T. 62 : 48 T. L. R. 652 : 43 Ll. L. Rep. 435, *Croft v. Dunphy*.

7. (1889) 14 A. C. 493 : 59 L. J. Q. B. 53 : 61 L. T. 518 : 38 W. R. 289 : 54 J. P. 277, *Colquhoun v. Brooks*.

8. (1927) 1 Ch. 107 : 96 L. J. Ch. 58 : 136 L. T. 436 : 42 T. L. R. 771 : 70 S. J. 1024, *London and South American Investment Trust v. British Tobacco Co. (Australia)*.

9. (1918) 25 C. L. R. 183, *Nathan v. Federal Commissioner of Taxation*.

10. (1921) 29 C. L. R. 134, *Murray v. Federal Commissioner of Taxation*.

a words of Fletcher Moulton L. J. in (1908) 2 K. B. 89¹¹ at page 98, the share-holder did not carry on the business of the company, but was only entitled to the profits of the business to a certain extent fixed and ascertained in a certain way dependent on the constitution of the corporation. This argument was overruled by all the learned Judges.

In (1918) 25 C. L. R. 183,⁹ Isaacs J., delivering the judgment of the Court, observed that the question as to the source of the shareholder's income was a question of fact to be determined on practical grounds. In both the cases, the Court held that though no individual corporator could lay claim to any portion of the profits made by the company, every corporator had an interest in them. The very observation of Fletcher Moulton L. J. in (1908) 2 K. B. 89¹¹ quoted above recognizes that the share-holder "is entitled to the profits of that business to a certain extent." The language used by Brett and Cotton L. JJ. in (1881) 7 Q. B. D. 562¹² shows that dividends are paid out of profits—and in that sense must have the same source—and this is not affected by the remarks made on that case in 1940 A. C. 81.¹³ It is true that the profits of a company may not materialise into a dividend for the shareholder till a dividend is declared, but that is different from saying that when the dividend is declared the "source" of the dividend is not the same as the source of the profits made by the company.

c In 1923 A. C. 744,¹⁴ to which Mitter J. has referred, the American Thread Co. had itself been declared by an earlier decision of the House to be assessable to income-tax on the footing that it carried on business in England, because the business in America was controlled from England; and the question subsequently arose, whether dividends declared in America by the American company, but received in England by an English company which held almost all the ordinary shares in and controlled the American company could (for certain other income-tax purposes) be regarded as "profits received from a foreign

possession." This was answered in the negative on the ground that for the purposes of the English Income-tax Acts "the locality of the shares or stock of a company was to be determined by its place of residence and trading". On the question of "source", the following observations of Lord Wrenbury (at pp. 767, 768) are worth noting:

"The possession of the English company was of shares which (if a dividend was declared) entitled them to receive from a company resident here a dividend whose source was the differential sum remaining in the hands of the company resident here after that company resident here had paid income-tax upon all its profits."

With these we may take the remarks of Viscount Cave in 1925 A. C. 495¹⁵ at page 504 where, referring to 1923 A. C. 744¹⁴ the Lord Chancellor said:

"The Crown, having established in *Joyce's case* (1913) 6 Tax. Cas. 1, 163¹⁶ that the profits of the company during the period in question were for the purpose of taxing the company to be treated as earned here, could not now be heard to say that for the purpose of taxing the share-holders they were earned abroad. *The source of income was the same in both cases.*"

(The italics are ours.) Here, the Lord Chancellor clearly treats the income of the company and the dividend income of the shareholders as derived from the same "source". In (1921) 1 A. C. 172¹⁷ at page 178, Viscount Haldane, dealing with a Scottish company doing business in Australia and New Zealand, says "what remained as nett balance was remitted to Scotland to be divided as profit" and in the same case (on page 182) Viscount Finlay states:

"If this colonial tax had not existed, so much more would have been available as profits from the business in the Colonies for division among the shareholders of the company."

True, when a dividend is declared it becomes a "debt" for which the shareholder can sue the company, but that is not a picture of the whole transaction. The company can declare dividends only when it has earned profits; the real question, therefore, is where has the money out of which the dividends are declared been earned? How exactly this question is to be answered when the dividends have passed through more than one company will depend upon the circumstances of each case. No such difficulty arises here.

11. (1908) 2 K. B. 89 : 77 L. J. K. B. 834 : 99 L.T. 39 : 15 Manson 251 : 5 Tax. Cas. 358 : 24 T. L. R. 480, Gramophone & Typewriter Ltd. v. Stanley.

12. (1881) 7 Q. B. D. 562 : 46 L. T. 10, Gilbertson v. Ferguson.

13. (1940) 1940 A.C. 81 : 108 L. J. K. B. 893 : 161 L.T. 181 : 83 S.J. 831 : 55 T.L.R. 1073 : (1939) 3 All. E. R. 803 : 22 Tax. Cas. 655, Barnes v. Hely Hutchinson.

14. (1923) 1923 A.C. 744 : 92 L. J. K. B. 736 : 129 L.T. 546 : 67 S. J. 678 : 39 T.L.R. 590, Bradbury v. English Sewing Cotton Co.

15. (1925) 1925 A.C. 495 : 94 L. J. K. B. 527 : 133 L.T. 97 : 41 T.L.R. 385 : 9 Tax. Cas. 342, Swedish Central Ry. Co. v. Thompson.

16. (1913) 6 Tax. Cas. 1, 163, American Thread Co. v. Joyce.

17. (1921) 1 A.C. 172 : 89 L. J. P. C. 220 : 65 S. J. 24 : 36 T.L.R. 830 : 1920 Sc. H. L. 187 : 124 L.T. 225, Scottish Union & National Insurance Co. v. New Zealand & Australian Land Co.

a In (1934) 51 C.L.R. 172¹⁸ and (1937) 56 C.L.R. 337,¹⁹ the Australian High Court went even further than in the earlier cases and held that interest paid to a non-resident foreigner on debentures raised in a foreign country might be said to have its "source" in Australia, if the moneys borrowed had been used by the borrowing company for carrying on business in Australia or had been secured by the mortgage of any property in Australia. It is not necessary for the purpose of this case to go so far as the Australian High Court has gone in these later cases. The connexion between "interest" payable by the company to its creditors and the "profits" made by the company in its own business is not so direct as that between "dividends" and "profits", and what is more important, the interest due to the creditor will be payable whether profits are made or not. In 1938 A. C. 524,²⁰ the Lord Chancellor observed (in passing)

"the holders (of the debentures) or most of them reside in Great Britain and they could not therefore be directly liable to pay income-tax under a New Zealand statute which is necessarily subject to well known territorial limitations" (page 544).

There are however certain observations in the later Australian decisions which seem to us justified in principle and their appositiveness to the present case is not affected by the circumstance that under the Australian legislation the tax payable in respect of the interest was assessed upon the company itself, giving a right to the company to deduct the amount thus paid from the amount payable to the creditor or debenture-holder. In (1934) 50 C.L.R. 581²¹ at p. 600, Dixon J. said:

"So long as the statute selected some fact or circumstance which provided some relation or connexion with New South Wales and adopted this as the ground of its interference, the validity of an enactment would not be open to challenge."

d The question was more fully discussed in (1937) 56 C. L. R. 337.¹⁹ Latham C. J. recognized that the case was perhaps an extreme one. It is sufficient for our present purpose to take the principles accepted by Rich J. in his dissenting judgment. The learned Judge observed (on page 361):

"I do not deny that once any connexion with New South Wales appears, the Legislature of that State

18. (1934) 51 C.L.R. 172, Colonial Gas Association Ltd. *v.* Federal Commissioner of Taxation.

19. (1937) 56 C.L.R. 337, Broken Hill South Ltd. *v.* Commissioner of Taxation (N.S.W.).

20. (1938) 1938 A.C. 524: 107 L. J. K. B. 393 : 159 L. T. 418 : 82 S. J. 412 : 54 T. L. R. 586 : 1938-2 All. E. R. 88, Inland Revenue Commissioners *v.* National Mortgage & Agency Co. of New Zealand.

21. (1934) 50 C. L. R. 581, Wanganui-Rangitikei Electric Power Board *v.* Australian Mutual Provident Society.

may make that connexion the occasion or subject of the imposition of a liability. But," he added,

"the connexion with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connexion."

On the facts of the particular case, he dissented from the conclusion of his brethren because he thought that in respect of the interest sought to be assessed in that case, there was no necessary relation between it and the existence in New South Wales of some item of property comprised in a security to which directly or indirectly the tax-payer might resort if the interest was not paid. As he said on p. 362, the tax was there laid upon income which was not necessarily derived from or was affected by the New South Wales connexion. One other point was emphasized by Dixon J. on p. 375 :

"If a connexion exists, it is for the Legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority, Courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connexion."

If some connexion exists, the Legislature is not compelled to measure the taxation by the degree of benefit received in particular cases by the tax-payer. This affects the policy and not the validity of the legislation. In the High Court, Derbyshire C. J. has stated that on the wording of Explan. 3 to S. 4 (1), Income-tax Act, the money

"has been already subjected to tax in British India and therefore was received by foreign dividend paying company free from liability to tax in British India."

It is difficult to follow the learned Chief Justice. The qualifying words were inserted in the explanation to indicate that the "source" was in British India. They carry no implication of "freedom from liability to tax in British India." If, in the circumstances of this case, the dividends had been declared and paid in British India, the recipients thereof would be liable to income-tax and super-tax, notwithstanding payment of income-tax and super-tax by the company, subject, of course, to the benefit of S. 49B which has also been allowed to the plaintiff. The learned Judges have laid great stress upon the circumstance that the situs of the shares held by the plaintiff-company must, according to a long course of authority, be held to be English. This may be material in respect of any attempt to levy a tax like estate duty or legacy duty on the

a corpus of the shares. Cf (1882) 8 A.C. 82,²² 1925 A.C. 371,²³ 1933 A.C. 710²⁴ and (1932) 48 C.L.R. 618.²⁵ But when the attempt is to tax income and not the corpus and the question to be considered is the source of that "income," it seems to us legitimate to take into account the place where the business from which the income is derived is in fact carried on and not to treat the situs of the shares in the eye of the law as concluding the matter.

In (1927) 1 Ch. 107,⁸ the learned Judge had to deal with a very limited question, namely, the effect which a provision in an Australian enactment could have on the rights and liabilities of parties in respect of a debt arising under an English contract. On this point, the learned Judge said :

"If the debt arises under an English contract and is an English debt, I do not think (1) that it is property in respect of which the Commonwealth Legislature has power to impose taxation upon the plaintiff-company or (2) that it is property, the incidence of which can be altered by the Commonwealth Legislature" (p. 119).

The effect and the implications of this pronouncement have been variously interpreted. (See Ratcliffe and McGrath, "Australian Income-tax Law" at pp. 62, 176, 177, and Shaw and Barker, "The Law of Income-tax," at pp. 12, 240, 284.) If its effect is only to lay down that Courts in one country will not feel bound by the revenue laws of another country or that a foreign Legislature cannot affect the rights inter se of the parties to an English contract (cf. observation of Lord Macmillan in 1938 A.C. 524²⁰ at page 555), the case will have little bearing upon the present question. If the observations of the learned Judge are however to be relied on as bearing on the question whether an Australian Court could hold against the validity of an Australian law assessing to income-tax the dividend paid to an English share-holder by an English company deriving its revenue from the shares it held in other companies which carried on business in Australia, the decision must be read in the light of certain facts on which the learned Judge himself has laid stress. The plaintiff in that case held shares in two companies, namely, the defendant-company and the Australian Pastoral Company. The plaintiff was a trust investment company and the

defendant-company too was not a trading company, but derived its revenue from its holdings of shares in other companies. The defendant-company had declared a dividend of 12 per cent. on its ordinary shares for the year ending 30th June 1922, and the amount payable to the plaintiff-company in respect thereof had in due course been paid to the plaintiff-company. The income-tax authorities in Australia assessed the plaintiff to income-tax in respect of these dividends; but, in view of the difficulty of collecting the tax from the plaintiff, they purported to make the defendant-company their agent as well as the plaintiff's agent and asked it to pay the amount of the tax payable by the plaintiff and deduct it from any amounts which it might have to pay to the plaintiff. The defendant-company paid the amount and deducted it from the dividend payable to the plaintiff for the next year. The plaintiff-company claimed that it was entitled to payment of the full amount of the dividend without this deduction and contended that the Australian Legislature had no power to assess it to income-tax in respect of the dividends; it further said,

"whether the legislation is ultra vires or not, as between itself and the defendant-company, the contract which regulates their relations is an English contract and the dividend payable to it by the defendant-company is a debt recoverable and locally situate in England and that it is no answer to the claim for the dividend that the defendant-company has been compelled by Australian law to make certain payments to the Federal Government of Australia."

Dealing with the powers of the Australian Legislature, the learned Judge said that its powers of taxation

"do not extend to authorize the imposition of taxation upon a person who is not resident or domiciled within the Commonwealth, in respect of *property which is not situate within the Commonwealth.*"

(The italics are ours.) To the proposition thus stated, no exception can be taken; the learned Judge did not purport to deal with the question of the source of the income at all. It is important to see how the learned Judge applied the proposition stated by him. His differentiation between dividends received from the Australian Pastoral Co., and dividends received from the defendant-company is significant, in the light of the circumstance stressed by him in the course of the argument on p. 110 and repeated by him in the course of his judgment, that the defendant-company did not actually carry on business in Australia, but was a purely holding company. As we understand the judgment, it was because there was no evidence to show whether the same was the

22. (1882) 8 A.C. 82 : 52 L.J.P.C. 10 : 48 L.T. 441 : 31 W.R. 645, *Blackwood v. The Queen*.

23. (1925) 1925 A.C. 371 : 94 L.J.P.C. 81 : 132 L.T. 647 : 41 T.L.R. 203, *Brassard v. Smith*.

24. (1933) 1933 A.C. 710 : 102 L.J.P.C. 137 : 149 L.T. 563, *Provincial Treasurer of Alberta v. Kerr*.

25. (1932) 48 C.L.R. 618, *Commissioner of Stamp Duties (N. S. W.) v. Millar*.

a case even as regards the Australian Pastoral Company that the learned Judge said (on page 118) :

"In the absence of evidence, I will assume that it (plaintiff-company) was taxable in respect of its dividends received from the Australian Pastoral Company, Ltd."

b Where the company in which the non-resident shareholder holds shares is not carrying on business in the taxing country, it may be possible to say that the connexion between the non-resident shareholder of the first company and the profits arising out of the trade carried on by another company in which the first company held shares is too remote to justify the imposition of income-tax on that shareholder or on dividends received by him from the first company, by the State in which the trading company carried on business. On the facts of that case, the importance attached by the learned Judge to the situs of the plaintiffs' shares is understandable. In the circumstances of the present case, we are of the opinion that the "source" of the dividends paid to the plaintiff-company by the sterling companies was British Indian and that in making them liable to income-tax on that basis the Indian Legislature is not giving its law any extra-territorial operation.

c Proceeding next to the appellant's alternative contention, that the extra-territorial operation, even if there was any, of the impugned provisions is no ground for holding them to be ultra vires the Indian Legislature, it will be convenient at the outset to advert to the distinction in this respect between sovereign Legislatures and non-sovereign or subordinate Legislatures. In the case of the former, the possible extra-territorial operation of a statute can furnish no argument in the Courts of that country for holding that statute to be pro tanto invalid. Arguments as to the territorial limits of legislative jurisdiction and to the accepted rules of international law in this behalf will be relevant only as furnishing a presumption or rule of construction against an intention to exceed the territorial jurisdiction or to violate the rules of international law, if and when the language of the statute is general. Where, however, the meaning and intent are plain, the presumption or rule of construction must give way. Even in the case of enactments passed by a non-sovereign Legislature, the rule of presumption or construction is equally relevant, where the language of the enactment is general. But where the language is plainly extra-territorial in its operation, the question becomes one as to the authority of the Legislature and the validity

of the law. 1893 A. C. 339²⁶ establishes that even in the case of a non-sovereign Legislature, nothing turns on the question whether or not the Courts of another country will give effect to a law passed by that Legislature or to decisions given under that law. So far as revenue laws are concerned, it is a well-established rule of Private International Law that the revenue laws of one country will not be enforced by the Courts of another country. Likewise, the practical difficulties that may arise in enforcing the extra-territorial provisions of a taxing statute are not by themselves a ground for invalidating them. The pertinent question is whether the particular legislation is authorized by the Constitution Act creating the subordinate Legislature and defining its powers.

If the language of the Constitution Act clearly indicates that the legislative power of the subordinate Legislature is subject to specified territorial limitations or if, on the other hand, the language authorizes expressly or by necessary implication extra-territorial legislation by the subordinate Legislature, the position is simple enough. Where, however, the language of the Constitution Act does not contain a sufficiently clear indication one way or the other, two views are possible : One is 9 that the language of that statute should be construed conformably to a general presumption against authorizing extra-territorial legislation, and the other view is that the statute should be construed on the basis that there is no such presumption or limitation. The one view or the other seems to have been taken according as a restricted or unrestricted view was taken of the sovereignty of the Dominions. The views that prevailed prior to 1916 have been discussed at some length in Clements' Canadian Constitution, pp. 85 *et seq.* : see also Jennings' Constitutional Laws of the British Empire, pp. 34 and 110, Dicey's Law of the Constitution, Edn. 8, p. 99, and Edn. 9, Note on page 103. There can be little doubt that the earlier view was that subordinate Legislatures should not be held "to possess any extra-territorial jurisdiction unless it is conferred upon them expressly or by necessary implication." : see the observations in 1891 A. C. 455²⁷ and 1912 A. C. 820.²⁸ The criticisms against this view have been referred to in the

26. (1893) 1893 A.C. 339 : 62 L. J. P. C. 107 : 1 R. 388 : 69 L. T. 159, *Ashbury v. Ellis*.

27. (1891) 1891 A. C. 455 : 60 L. J. P. C. 55 : 65 L. T. 321 : 17 Cox. C. C. 341, *Macleod v. Attorney-General for New South Wales*.

28. (1912) 1912 A. C. 820 : 82 L. J. P. C. 5 : 107 L. T. 101 : 28 T. L. R. 537, *Commercial Cable Co. v. Attorney-General for Newfoundland*.

a judgment of Evatt J. in (1933) 49 C. L. R. 220²⁹ at pp. 232-33. The question was considered by a Sub-Committee of the Imperial Conference of 1926, which reported that the subject was full of obscurity and there was conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent. These doubts and difficulties were set at rest by S. 3 of the Statute of Westminster of 1931. The matter was considered independently of this statute in 1933 A. C. 156.⁶ Their Lordships' judgment in this case emphasised the doctrine laid down as early as (1878) 3 A. C. 889³⁰ and (1884) 9 A. C. 117,³¹ namely, "once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the subjects enumerated in S. 91, British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State." In 1935 A. C. 500,³² reference was again made to (1884) 9 A. C. 117³¹ and it was added :

"In interpreting a constituent or organic statute, that construction most beneficial to the widest possible amplitude of its powers must be adopted."

c Speaking of the limitation imposed "by the doctrine forbidding extra-territorial legislation," the Lord Chancellor observed that that was a "doctrine of somewhat obscure extent."

d Though the Statute of Westminster is not applicable to India, the Constitution Act of 1935 has to be interpreted in the light of the discussions on this subject that had been taking place between 1926 and 1935. From this point of view, a comparison of the provisions of S. 65, Government of India Act of 1915, with the provisions of S. 99 of the present Act is instructive. The earlier provision (which reproduced the language of still earlier statutes) conferred on the Indian Legislature

"power to make laws (a) for all persons, for all Courts and for all places and things within British India, (b) for all subjects of His Majesty and servants of the Crown within other parts of India, and (c) for all native Indian subjects of His Majesty without and beyond as well as within British India, etc. etc."

The expression "places and things within British India" in cl. (a), interpreted in the

light of the decision in (1882) 8 A. C. 82²² and 1933 A. C. 710,²⁴ would have imposed a strict territorial limitation upon the powers of the Indian Legislature. The extra-territorial power contemplated by cls. (b) and (c) is conferred in specific terms and is not assumed to be included in the power conferred by cl. (a). In the Act of 1935, sub-s. (1) of S. 99 does not use the expression "things within British India," but empowers the Federal Legislature to make laws "for the whole or any part of British India" and the "topics" on which it can legislate are specified in Lists I and III of Sch. 7. This way of dealing with the matter is significant in the light of the observations above quoted from 1933 A. C. 156.⁶ The lines on which sub-s. (2) of S. 99 has been framed are even more significant. In the High Court, the learned Judges have read this sub-section as conferring power upon the Federal Legislature to exceed the territorial limits in certain cases and they accordingly limit this power to the five cases specified in that sub-section. This seems to us, with all respect, to be a misreading of the section. Unlike cls. (b) and (c) of S. 65, Government of India Act of 1915, sub-s. (2) of S. 99 is worded not as a provision "conferring power to make laws," but as a provision which assumes that the preceding sub-section is capable of being read as including the power to make laws even in respect of the matters specified in the five cases dealt with in sub-s. (2). This is made clear both by the opening words of sub-s. (2), namely, "without prejudice to the generality of the powers conferred by the preceding sub-section" and also by the tenor of the sub-section which only purports to obviate objection on the ground of extra-territorial operation. If it should be asked what necessity there was, in this view, for specifying particular cases in that sub-section, the answer would be that it was probably thought that the simple omission of the corresponding provisions found in the Act of 1915 might lead to the impression that the power to deal with those matters had been taken away from the Federal Legislature. Even the language of S. 99 (1) involves some limitation and it might have been considered safer to avoid all risk of any difference of opinion as to its scope, so far as the topics specified in sub-s. (2) were concerned. That the Federal Legislature's power of extra-territorial legislation is not limited to the cases specified in cls. (a) to (e) of sub-s. (2) of S. 99 appears clearly from entry No. 23 of List I of Sch. 7, relating to "fishing and fisheries beyond territorial waters." It would not be right to derive the

29. (1933) 49 C. L. R. 220, *Trustees, Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation*.

30. (1878) 3 A. C. 889, *The Queen v. Burah*.

31. (1884) 9 A. C. 117 : 53 L. J. P. C. 1 : 50 L. T. 301, *Hodge v. The Queen*.

32. ('35) 22 A. I. R. 1935 P. C. 158 : 157 I.C. 571 : 1935 A. C. 500 : 104 L. J. P. C. 58 : 1935 Ir. R. 487 : 153 L.T. 283 : 79 S. J. 541 : 51 T. L. R. 508, *British Coal Corporation v. The King*.

a power to legislate on this topic merely from the reference to it in the list, because the purpose of the lists was not to create or confer powers, but only to distribute between the Federal and the Provincial Legislatures the powers which had been conferred by ss. 99 and 100 of the Act. Nor can the power be inferred from the doctrine of accessory or necessary powers, for, it cannot be said that the other powers conferred on the Federal Legislature cannot be made effective without the right to legislate in respect of fisheries beyond territorial waters. The power so to legislate was obviously understood to have been conferred by sub-s. (1) of s. 99.

The only limitation that now exists is that which is involved in the connexion implicit in the expression "laws for British India." The words of Evatt J. in (1933) 49 C. L. R. 220²⁹ at p. 236 where he was dealing with the position of the Australian Legislature independently of s. 3 of the Statute of Westminster, are, in our opinion, equally true of the legal position in India, whatever the differences between the two countries in political conditions may be. The learned Judge said :

c "The Constitution requires that it must be possible to predicate of every valid law that it is for the peace, order and good government of the Dominion with respect to a granted subject, e. g., customs, taxation, external affairs. In such cases, the presence of non-territorial elements in the challenged law has to be considered upon a slightly different footing and those affirming its validity have to show not only that the Dominion has some real concern or interest in the matter, thing or circumstance dealt with by the legislation, but that the concern or interest is of such a nature that the challenged law is truly one with respect to an enumerated subject-matter."

d In our judgment therefore the extent, if any, of extra-territorial operation which is to be found in the impugned provisions is within the legislative powers given to the Indian Legislature by the Constitution Act.

The appeal is accordingly allowed. The case is remitted to the High Court at Calcutta with a declaration that for the decree of the High Court, dated 9th April 1943, there shall be substituted a decree dismissing the action with costs in the High Court. The respondent will pay the costs of the appellant here.

R.K.

Appeal allowed.

A. I. R. (31) 1944 Federal Court 62
(From Nagpur : ('44) 31 A. I. R. 1944 Nag. 201)

24th April 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Kunwar Lal Singh — Appellant
v.

Central Provinces and Berar —
Respondent.

Case No. 23 of 1943.

(a) Government of India Act (1935), S. 205 — Case heard by single Judge — Substantial question of interpretation of constitutional law involved — Judgment given by Judge — Certificate under S. 205 should be granted and appeal should be heard by Federal Court.

If any case is properly heard by a single Judge of a High Court, and if in that case is involved a substantial question of law as to the interpretation of the Constitution Act or any Order in Council made thereunder and if there is a judgment, decree or final order given or made by that Judge, a certificate under S. 205 (1) not only may but should be granted. Thereupon, an appeal will be opened direct to the Federal Court subject to the provisions of sub-s. (2) of S. 205. If an appellant prefers to exercise his right to appeal to the Federal Court under S. 205 in preference to first exercising a right of appeal to a Divisional Bench and obtaining a further certificate from such Divisional Bench, he deprives himself of the right to appeal given by sub-s. (2) of S. 205 on grounds on which he could have appealed without special leave to His Majesty in Council if no certificate had been granted. If he comes direct to the Federal Court, he has to rely in regard to any such grounds on obtaining the leave of the Federal Court to be heard thereon as further provided by sub-s. (2). The Federal Court cannot refuse to entertain the appeal until the right of appeal to the Divisional Bench has been exercised. There is no power or discretion in the Federal Court to refuse to hear a case in which a certificate has been granted, or to put an appellant on any such terms : ('43) 30 A. I. R. 1943 F. C. 29, *Rel. on.*

[P 64g, h; P 65a]

(b) Government of India Act (1935), S. 100 and Sch. 7, List 2, Item 39 — C. P. Land Revenue Act (1917 as amended in 1929)—Settlement of 1921 and kabuliyats regarding Wainganga zamindaris—No contractual or statutory rights created—C. P. Land Revenue of Estates Act, 1 of 1939, is not ultra vires.

There is nothing in any of the Acts of 1917 or 1929 or settlement of 1921 or the kabuliyats which amounted to any contractual or statutory rights of the zamindar which could not at any time be varied, suspended or repealed by enactment of the competent Legislature. The settlement was made and took effect under and by virtue of statutory powers and provisions which could at any time be repealed, varied or replaced by other statutory provisions duly enacted. In particular by enactment any new form or provisions for the next settlement could have been prescribed at any time. There was nothing to prevent the Legislature of the Central Provinces & Berar, to which under S. 100 and item 39 of List II in Sch. 7, Constitution Act, are given powers to legislate in regard to land revenue, acting directly in the matter and enacting in respect of all or some existing

assessments that the same should be increased as from a specified date to a specified amount. [P 65e, f]

(c) Government of India Act (1935), S. 299 (2) — Mere increase of land revenue is not acquisition within S. 299.

The mere increase of an assessment for land revenue does not involve any acquisition of the land or any rights in or over immovable property. The word "acquisition" implies that there must be an actual transference of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to. It is impossible to suggest that when the land revenue is increased, there is any transference to the Provincial Government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of the assessment. The case does not come within S. 299 (2). [P 65h; P 66a]

M. R. Bobde and Harish Chandra, Senior Advocates (with G. R. Bapat, Advocate, Nagpur High Court, who appeared for the appellant in the High Court), instructed by Ganpat Rai, Agent — for Appellant.

W. B. Pendharkar, Advocate, Federal Court (with S. B. Palsole, Advocate, Nagpur High Court, who appeared for the respondent in the High Court), instructed by B. Banerji, Agent — for Respondent.

Spens C. J. — The appellant, Rao Bahadur Kunwar Lal Singh, is a zamindar holding three estates in the Central Provinces known as Kamtha, Wadad and Deori-Kishori.

These are held in zamindari rights and are among the zamindaris known as the Wain-ganga zamindaris. The zamindars are assessed periodically in respect of their estates for 'takoli.' Such assessments are made as part and parcel of the periodical settlement of land revenue for the areas in which the estates are situate. Early in January 1939, the appellant was holding his estates subject to the liability for takoli as follows :

	Rs.
Kamtha	71,000
Wadad	19,000
Deori-Kishori	1,800

Such liability arose under and by virtue of the last periodical settlement of land revenue, namely that known as Gordon's Settlement made in 1916-1921 and completed in accordance with the provisions of the Central Provinces Land Revenue Act, 1917 (hereinafter referred to as 'the Act of 1917'). Assessments at the above figures were duly made in respect of the appellant's estates and duly offered in accordance with S. 82 of the above Act by three kabuliyats of 8th January 1921. These were deemed to have been accepted and made binding by three orders of 5th May 1921, made in accordance with the provisions of S. 87 of the said Act. The said kabuliyats and orders were produced as exhibits in the action and were numbered P. 4,

5, 6, 7, 8, 9 respectively. It is to be noted that the kabuliyats and orders in respect of the Kamtha and Wadad estates purported to make the assessments binding for the period of "19 years, that is, from 1st July 1919, A. D. up to 30th June 1938, and thereafter till a fresh settlement is made"; whereas the kabuliyat and order in respect of the Deori-Kishori estate were for the period of 19 years from 1st July 1920, to 30th June 1939, and thereafter till a fresh settlement was made.

Section 88 of the Act of 1917, so far as material, provides as follows :

"88. If the assessment of an estate, mahal or land has been accepted under this Act, the proprietors shall be bound to pay the land revenue assessed thereon, together with, in the case of an estate or mahal, the land revenue assessed on any separately assessed plots of land included therein, from such date and for such term as the Provincial Government may appoint in this behalf, or, if at the expiry of such term no new assessment has been made and is ready to take effect, until a new assessment has been made and is ready to take effect"

The Act of 1917 was amended, supplemented or varied in matters not material to this case by the Central Provinces Settlement Act of 1929 (Act No. 6 of 1929.).

On 6th January 1939, the Central Provinces Revision of the Land Revenue of Estates Act, 1939 (Central Provinces and Berar Act 1 of 1939) purported to take effect. The said Act (hereinafter called "the Act of 1939") provided by S. 2 :

"2. With effect from 1st July 1938, the land revenue payable to Government in respect of the estates named in the second column of the Schedule under their current settlement shall, notwithstanding any contract to the contrary or anything contained in the Central Provinces Settlement Act, 1929, or in Chap. 6, Central Provinces Land Revenue Act, 1917, but without prejudice to the proviso to sub-s. (1) of S. 85 of the latter Act, be enhanced to the amounts shown in the third column of the said Schedule."

And in the schedule appear the following entries :

	Rs.
Kamtha	93,386
Wadad	24,250
Deori-Kishori	2,570

Since the passing of the said Act, by agreement the following figures have been substituted for those quoted above from the schedule :

	Rs.
Kamtha	91,440
Wadad	23,702
Deori-Kishori	2,544

Moreover S. 2 of the said Act has been amended by the Central Provinces and Berar Act (Act 12 of 1941) so as to read as follows :

"2. With effect from 1st July 1938, the land revenue payable to Government in respect of the estates named in the second column of the Schedule under their current settlement shall, notwithstanding any

a contract to the contrary or anything contained in the Central Provinces Settlement Act, 1929, or in Ch. 6, Central Provinces Land Revenue Act, 1917, be the amounts shown in the third column of the said Schedule and the said amounts shall be deemed to have been assessed, offered and accepted under the said Chapter."

The result of the above legislation is to increase the takoli assessed on the above estates by the following amounts :

	Rs.
Kamtha	20,440
Wadad	4702
Deori-Kishori	744
Total	25,886

b In due course the appellant started an action against the Provincial Government in the Court of Additional District Judge, Bhandara, in which he claimed that at the time when the Act of 1939 purported to become effective he was entitled under the provisions of the existing settlement and the Act of 1917 and the material kabuliyats and orders above referred to to continue to hold his zamindari estates so long as the respective amounts of takoli for which they were assessed by that settlement were paid until a new settlement was "made in accordance with the provisions of the law that is applicable to all proprietors owning land-revenue-paying estates or properties," that no such new settlement had been made but that instead the Act of 1939 had been passed which extinguished or deprived the appellant of his contractual as well as statutory rights in his zamindaris and, further, amounted to an acquisition or expropriation of his rights as provided by S. 299, Government of India Act, 1935, for some purpose which the Government had in view. He asked for a declaration that the Act of 1939 was accordingly null and void, or that the Central Provinces Legislative Assembly had no power to enact the Act of 1939 without making provision for compensation under S. 299, Constitution Act, and that the same Legislature could not enact the Act of 1939 so as to override the contractual or statutory rights of the plaintiff under the Act of 1917 and Act 6 of 1929 and that for these reasons the Act of 1939 which was enacted by it was ultra vires and not binding on the plaintiff.

a On 21st October 1940, an order was made under S. 225, Constitution Act, transferring the action for trial in the High Court at Nagpur. On 27th February 1941, an application was made, and refused, to refer the suit to the Chief Justice to be placed before a Bench of two Judges for trial. On 25th January 1943 and the following days this case, with another

of a similar nature, came on for trial before Vivian Bose J. alone. On 31st January (sic March) 1943,* Bose J., dismissed the action with costs, but granted a certificate under S. 205, Constitution Act. From this order an appeal was brought direct to this Court.

Upon this appeal coming on for hearing by this Court, a preliminary objection was taken on behalf of the respondents that under S. 205, Constitution Act, no appeal would lie direct to the Federal Court from a judgment, decree or final order of a single Judge of a High Court where a certificate has been granted by him, in cases where the appellant has a right of appeal to a Divisional Bench of a High Court, as in fact the appellant had in this case under the Letters Patent of the High Court at Nagpur. Stress was laid on the provisions in the Letters Patent relating to appeals to His Majesty in Council, by which no appeal from the order of a Single Judge is permitted direct to His Majesty in Council, in cases where an appeal to a Divisional Bench is permissible. No similar express provision exists in the Constitution Act either in S. 205 or elsewhere. A similar point arose before this Court, but was not decided, in (1943) 6 F. L. J. F. C. 55¹ On consideration, we are of opinion that a direct appeal to this Court in this case is authorized by sub-s. (1) of S. 205. If any case is properly heard by a Single Judge of a High Court, and if in that case is involved a substantial question of law as to the interpretation of the Constitution Act or any Order in Council made thereunder and if there is a judgment, decree or final order given or made by that Judge, in our judgment a certificate under S. 205 (1) not only may but should be granted. Thereupon an appeal will be opened direct to this Court subject of course to the provisions of sub-s. (2) of S. 205. It may well be that if an appellant prefers to exercise his right to appeal to this Court under S. 205 in preference to first exercising a right of appeal to a Divisional Bench and obtaining a further certificate from such Divisional Bench, he may deprive himself before this Court of the right to appeal given by sub-s. (2) of S. 205 on grounds on which he could have appealed without special leave to His Majesty in Council if no certificate had been granted. If he comes direct to this Court, he will have to rely in regard to any such grounds on obtaining the leave of this Court to be heard thereon as

*See (1944) 31 A.I.R. 1944 Nag. 201.

1. (1943) 30 A.I.R. 1943 F. C. 29 : 207 I. C. 600 : I.L.R. (1943) Kar. F. C. 39 : 1943-6 F. L. J. F. C. 55 (F.C.), Jagannath Baksh Singh v. United Provinces.

further provided by sub-s. (2). In our opinion Bose J., properly gave a certificate in this case and the appellant was therefore entitled to appeal direct to this Court; and this Court is entitled, if not bound, to entertain this appeal. It was suggested, but not strongly pressed, that, even if the appeal was competent, this Court should refuse to entertain the appeal until the right of appeal to the Divisional Bench had been exercised. It is difficult to read out of S. 205, or any other section of the Constitution Act, any power or discretion in this Court to refuse to hear a case in which a certificate has been granted, or to put an appellant on any such terms as those suggested. We are doubtful if this Court has any such power or discretion. It is however of no importance in this case, for, we certainly see no reason to impose on the parties the burden and expense of an intermediate appeal to a Divisional Bench before disposing of the two points on which this appeal has been based.

On behalf of the appellant it was submitted that such were the rights of the appellant conferred on him by the settlement of 1921, the provisions of the Act of 1917, and the material kabuliyats and orders referred to that (a) they amounted to statutory or contractual rights of which only a new settlement carried out in accordance with the provisions of the Acts of 1917 and 1929 could deprive him, (b) that the alteration of what he called his "right" to hold his estates subject only to the payment of the amounts of takoli fixed in 1921 on the terms of that settlement could not be made, as it was purported to be made by the Act of 1939, to his detriment without involving a compulsory acquisition for public purposes of some right belonging to him in or over immovable property and that as the Act of 1939 did not provide for the payment of compensation for the property so acquired and did not either fix the amount of the compensation or specify the principles on which and the manner in which it was to be determined it was ultra vires and void as being contrary to or not complying with the provisions of S. 299, sub-s. (2), Constitution Act.

As regards the first point, it may well be that the appellant may have believed, reasonably enough, in reliance upon the provisions and documents referred to, that he was going to hold his estates subject to the payment only of the takoli fixed in 1921 for the period specified in the kabuliyats and thereafter until a new settlement was made and that that new settlement would be made in

accordance with the Acts of 1917 and 1929. But we can find absolutely nothing in any of the Acts or documents referred to which amounted to any contractual or statutory rights of the appellant which could not at any time be varied, suspended or repealed by enactment of the competent Legislature. The settlement was made and took effect under and by virtue of statutory powers and provisions which could at any time be repealed, varied or replaced by other statutory provisions duly enacted. In particular by enactment any new form or provisions for the next settlement could have been prescribed at any time. In our judgment there was nothing to prevent the Legislature of the Central Provinces and Berar, to which under S. 100 and item 39 of List II in Sch. 7, Constitution Act, are given powers to legislate in regard to land revenue, acting directly in the matter and enacting in respect of all or some existing assessments that the same should be increased as from a specified date to a specified amount. It may be regarded by some persons as a drastic form of legislation; in so far as it only increases some and not all assessments it may also be regarded as invidious legislation, but these are not matters for us. We are only concerned with the legality of the legislation; and we are quite unable on the suggested grounds to find any reason for questioning the validity of the Act under consideration.

As regards the second point, the case of the appellant is based on the view that under the settlement of 1921, the Act of 1917, the kabuliyats and orders referred to he enjoyed a "right" to hold his estates subject only to the payment of the amounts of takoli fixed in 1921 and that the increase of the amount of takoli so payable on his estates to a higher figure involves the acquisition from him of a right in or over immovable property to the extent to which his position is made worse by the increase of the amount of takoli payable. In our judgment, this view is misconceived. His rights over his land or his rights in or over his immovable property remain exactly the same, only his liability for payment of takoli is increased. It is, we think, impossible to hold that the mere increase of an assessment for land revenue involves any acquisition of the land or any rights in or over immovable property. It further seems to us that the word "acquisition" implies that there must be an actual transference of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to. It is impossible, in our view, to sug-

a gest that when the land revenue is increased, there is any transference to the Provincial Government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of the assessment. In our judgment the attempt to bring the case within S. 299 (2) must fail. For these reasons this appeal fails and must be dismissed with costs.

R.K.

*Appeal dismissed.***A. I. R. (31) 1944 Federal Court 66***(From Patna)*

24th April 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Lieutenant Hector Thomas Huntley*
Appellant

v.

Emperor.

Criminal Appeal No. 2 of 1944.

(a) Government of India Act (1935), S. 270 (1) — Essentials to be proved for attracting S. 270 (1) indicated—Receiving illegal gratification is not act done or purporting to be done in execution of duty.

c In order to attract the provisions of S. 270 (1) it is not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant or taking advantage of his position as a public servant, he did certain acts; it must be established that the act complained of was an official act. The act of receiving illegal gratification by a public servant cannot be regarded as an act done or purporting to be done in execution of duty within the meaning of S. 270 (1). [P 67g]

(b) Criminal Law Amendment Ordinance (29 of 1943), S. 6 (2) — Cases triable under Ordinance—S. 197, Criminal P. C., does not apply.

Section 6 (2) of the Ordinance read with S. 1 (2), Criminal P. C., indicates that S. 197, Criminal P. C., does not apply to cases triable under the Ordinance. [P 68a,b]

a (c) Penal Code (1860), S. 161—Charge under — Proof of — Prosecution must exclude every reasonable possibility of innocence of accused.

A charge under S. 161 is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal. [P 68g,h]

(d) Penal Code (1860), S. 161—Station master supplying wagons and honestly though mistakenly believing that demurrage had or was likely to become chargeable taking Rs. 20 on account of same—Station master held not guilty under S. 161.

The prosecution story was that P approached the accused, a station master, and asked to be allotted two wagons for the despatch of live-stock. The accused said that the wagons would be available but the live-stock would be despatched only if P paid him Rs. 20. The case of the prosecution was that the accused received Rs. 20 as illegal gratification for providing wagons required by P. The case of the accused was that the money was deposited with him by P on account of demurrage. The special Tribunal being of opinion that no demurrage would have become legally payable, held that the accused received the money as illegal gratification and convicted him under S. 161 :

Held that for the purpose of convicting the accused under S. 161 it was not enough to find that no demurrage would have become legally payable. If the accused honestly, though mistakenly believed that demurrage had or was likely to become chargeable, a payment received by him in respect of it would not render him guilty of an offence under S. 161.

[P 69h; P 70a; P 71h]

H. G. Walford, Senior Advocate (with S. C. Ghose, Advocate) instructed by Gurudayal Sahai, Agent — for Appellant.

Mahabir Prasad, Advocate-General of Bihar (with Gopal Prasad, Advocate) instructed by S. P. Varma, Agent — for the Crown.

Sir Brojendra Mitter, Advocate-General of India (H. K. Bose with him) instructed by K. Y. Bhandarkar, Agent, appeared in response to notice issued to him under O. 36, R.1, F. C. R. 1942.

Zafrulla Khan J.—Ordinance 29 of 1943 was promulgated by the Governor-General on 11th September 1943. It empowered the Central Government to constitute two Special Tribunals (S. 3), and provided that the Tribunals shall have jurisdiction to try the cases allotted to them in Sch. 1 (S. 5). Schedule 1 set out in two lists the names of persons to be tried by the Tribunals and specified in the case of each by reference to sections of the Indian Penal Code the offence or offences in respect of which they were to be tried. Entry No. 6 in the first list reads :

Lt. H. T. Huntley, Station Master,
Jamalpur, E. I. Railway...Section 161, Penal Code.

Lt. Huntley (hereinafter referred to as the appellant) was tried and convicted by the Tribunal sitting in Calcutta of an offence under S. 161, Penal Code, and was sentenced to 18 months' rigorous imprisonment and a fine of Rs. 500 and in default of payment of the fine to a further period of six months' rigorous imprisonment.

The Ordinance excluded appeals from orders and sentences of Special Tribunals (S. 7) but preserved the revisional jurisdiction of the High Courts under Chap. 32, Criminal P. C. (S. 8). The appellant accordingly moved the Patna High Court, which had jurisdiction in the matter, in revision. The High Court dismissed the revision petition but granted a certificate under S. 205 (1), Constitution Act. Hence the appeal to this Court.

- a The prosecution story was that P. W. 1 approached the appellant on 22nd May 1943, and asked to be allotted two wagons for the dispatch of sheep and goats from Jamalpur to Bally (a Calcutta suburban station). The appellant asked him to come two days later with the necessary forms. P. W. 1 returned on the 24th with the forms (Exs. 1 and 2) duly filled in and signed, whereupon the appellant told him to wait while he telephoned to find out whether the wagons were available. After telephoning he asked him to bring the livestock for loading on the 25th. P. W. 1 said that he could not be ready on the 25th and so he
- b was asked to come on the 26th and was told that the livestock would be dispatched only if he paid the appellant Rs. 20. On the 26th, P.W. 4 an Inspector of Police got in touch with P. W. 1, and having ascertained from him how the matter between P. W. 1 and the appellant stood, arranged with P. W. 1 that he should on visiting the appellant pay him the sum of Rs. 20 in the shape of currency notes which would be provided by P. W. 4. P. W. 4 then proceeded to Monghyr and obtained formal permission from P. W. 5, the Sub-Divisional Officer, to investigate the case. P. W. 5 further agreed to accompany P. W. 4 to Jamalpur.
- c On arrival at Jamalpur they met P. W. 1, and P. W. 4 initialled two currency notes of the value of Rs. 10 each and gave them to P. W. 1 who went into the appellant's office. P. W. 4 and P. W. 5 waited outside on the platform at a little distance. A few minutes later, P.W. 1, came out of the office and made a sign to them indicating that he had done what was required of him. P. Ws. 4 and 5 then went into the office and recovered the notes from the appellant. The case of the prosecution was that the notes were received by the appellant for himself as illegal gratification for providing the wagons required by P. W. 1.
- d The case of the appellant was that the money was "deposited with him by P. W. 1 on account of demurrage" (para. 15 of the complaint). The Tribunal held that the prosecution case was established and that the offence with which the appellant was charged had been brought home to him.

No objection appears to have been taken before the Tribunal to the validity of Ordinance 29. Before the High Court the validity of the Ordinance was impugned and objection was also taken to the maintainability of the prosecution in the absence of (a) the consent of the Governor-General under S. 270 (1), Constitution Act, and (b) the sanction of the Governor-General in Council under S. 197, Criminal P. C. These objections were over-

ruled by the High Court. The objection to the validity of the Ordinance was not pressed before us. It requires no further consideration.

With reference to the objection based on lack of consent under S. 270 (1), Constitution Act, the learned Judges of the High Court were of the opinion that the Governor-General by promulgating the Ordinance constituting the Special Tribunals and specifying the case against the appellant as one of the cases which the Tribunals would have jurisdiction to try must be deemed to have given his consent to the initiation of the criminal proceedings against the appellant. As regards S. 197, Criminal P. C., one of the learned Judges held that the section was inapplicable as the appellant had failed to establish that he was within the category of public servants to whom that section was applicable, and the other was of the opinion that the operation of that section was excluded by S. 6 (2) of the Ordinance.

These two objections were repeated and pressed before us. In our judgment they are without force. Section 270 (1), Constitution Act, relates to proceedings instituted against a person "in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown." In 1939 ⁹ F.C.R. 159¹ this Court laid down that to attract the provisions of this section it was not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant, or taking advantage of his position as a public servant, he did certain acts; it must be established that the act complained of was an official act. In this case the act complained of was the act of receiving illegal gratification. That surely could not be an act done or purporting to be done in the execution of duty. On p. 179, (1939) F.C.R. 159,¹ Sulaiman J. observed :

"For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in his official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification."

So far as the contention based on S. 197, Criminal P. C., is concerned, we consider that the ground stated by each of the learned Judges of the High Court to repel it, is adequate. The appellant has made no attempt

1. (1939) 26 A.I.R. 1939 F. C. 43 : 181 I.C. 317 : 40 Cr.L.J. 468 : I.L.R. (1940) Lah. 400: I.L.R. (1939) Kar. F.C. 132 : 1939 F.C.R. 159 (F.C.), *Hori Ram Singh v. Emperor*.

a to establish that he belongs to the class of officers who are entitled to the protection provided by that section. We are also of the view that S. 197 is not applicable to cases triable under Ordinance 29. Section 1 (2), Criminal P. C., enacts that in the absence of any specific provision to the contrary, nothing contained in the Code

"shall affect any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force."

b Section 6 (2) of the Ordinance makes the provisions of the Code, except S. 196A and Chap. 33, applicable to proceedings of a Special Tribunal so far as they are not inconsistent with the Ordinance. This must be construed in the light of S. 1 (2) of the Code and when so construed operates in our judgment to exclude the applicability of S. 197 to these proceedings. It was argued that the express exclusion of S. 196A furnished an indication that S. 197 was not intended to be excluded. We are unable to take that view. The express exclusion of S. 196A was in our opinion by way of abundant caution and cannot affect the operation of S. 1 (2) of the Code, which expressly saves special jurisdiction and powers and special forms of procedure such as have been conferred and c prescribed by the Ordinance.

On behalf of the Crown it was suggested that inasmuch as S. 197 relates to prosecutions in respect of offences alleged to have been committed by public servants when acting or purporting to act in the discharge of their official duty, the protection afforded by this section was limited to the kind of act contemplated in S. 270 (1), Constitution Act, and that therefore S. 197 was inapplicable to the present case for the same reason which rendered S. 270 (1) inapplicable. As we have held d that the objection based on S. 197 fails on the grounds stated by us, it is unnecessary to decide whether the acts contemplated by S. 197 of the Code are the same as those covered by S. 270 (1), Constitution Act.

We were asked to grant leave for grounds on the merits to be urged before us. The learned Judges of the High Court did not record any finding on the merits as they considered the merits only incidentally to discover whether through any defect in procedure the accused had been deprived of the right of fair trial or whether the decision of the Tribunal was vitiated by some mistake of law. They were of the view that having regard to the practice of the Court, they were not entitled in the exercise of their revisional jurisdiction to interfere with the decision of the

Tribunal, unless such a defect or mistake was shown to have occurred. In support of the prayer asking for leave, it was urged that the judgment of the Tribunal had proceeded upon erroneous principles and our attention was invited to certain portions of it which appeared to lend support to this contention. On consideration leave was granted by us and thereupon it was urged that the considerations upon which the conclusions of the Tribunal were based were not fully supported by the record. Before we proceed to consider this aspect of the case it is necessary to supplement the narration of facts set out earlier in the judgment with an account of what is f alleged to have passed between the appellant and P. W. 1 on the afternoon of 26th May 1943. P. W. 1 has stated that on entering the appellant's office he made over Exs. 1 and 2 to him. The appellant said that he should be paid his Rs. 20 first. On this P. W. 1 made over the two initialled ten-rupee notes to him. The appellant then returned Exs. 1 and 2 to P. W. 1 and also gave him a slip (Ex. 3) and asked him to make over the papers to the Goods Clerk and to tell him that the goods were being dispatched for military purposes. Exhibit 3 states that an application should be taken from P. W. 1 to the effect that he was g dispatching the goods on military account. Exhibits 1, 2 and 3 were handed over by P. W. 1 to P. W. 5 and never reached the Goods Clerk.

A charge under S. 161, Penal Code, is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered h has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

In this case, as in all cases of this kind, the direct evidence of the guilt of the appellant is that of an accomplice, namely that of P. W. 1. We have considered his testimony very carefully and find that on several matters with reference to which the truth of the story told by him could be tested, he has either prevaricated or contradicted himself. That he purported to be in negotiation with the appellant to secure the allotment of two wagons for the transport of livestock from Jamalpur

a to Bally, that he visited the appellant on 24th and 26th May 1943, filled in and signed Exs. 1 and 2, and handed over to the appellant on 26th May two ten-rupees notes, are almost the only matters which have been established beyond doubt so far as his evidence is concerned. The Tribunal did notice some of the unsatisfactory features in the testimony of P. W. 1, but took the view that it was not necessary to decide how far his evidence could be believed with regard to its uncorroborated parts. The impression left on our minds after a careful consideration of his evidence is that he is not a very satisfactory b witness. He certainly permitted his anxiety to support the prosecution case to overpower his regard for truth. He was not slow to invent details which, while giving a plausible colour to his story, were demonstrated in cross-examination to be false.

The story that he tried to make out was that he was a partner with one Makhdum in the sheep and goats business. According to him the livestock was being dispatched to Calcutta "in the ordinary course of trade as I had been doing all along." This was modified and the position was then stated to be that he was only a servant of Makhdum and c had never tried to arrange for the transport of livestock before, this being the first occasion. In fact the cross-examination tended to show that Makhdum in all probability was a fictitious person and that the sheep and goats had no existence outside the imagination of P. W. 1. But of course the appellant had no reason to suspect this. When asked whether the livestock was ever dispatched at all, and if so, when, P. W. 1 professed ignorance and stated that he was discharged by Makhdum on the 26th after the incident at the railway station as he had bungled the business. He started by stating that P. W. 4, d whom he did not know before, got in touch with him at his residence on the morning of the 26th. In cross-examination he stated "it is not a fact that Inspector Lahiri came to see me on the 26th morning at my residence." He stated in examination-in-chief that the appellant had asked him to visit him at 4 P. M. on the 26th. In cross-examination he stated :

"The Inspector asked me to come to the station at 4 P. M. If he had not, I should have gone earlier after finishing my meal."

As he was in the middle of his meal at 12-30 P. M. he would if left to himself have gone to the station about 1-30 P. M. The following passages from his cross-examination are illustrative :

"When Inspector Lahiri offered to pay Rs. 20 for

me it did not occur to me that in that case I might e not get the wagon. He told me that he was an Inspector of Police. He did not tell me why he was offering me Rs. 20 to pay the station master.

I got Rs. 20 from Mokdum to pay to the station master when I left Monghyr. I asked the Inspector why I should take his money when I had brought it. He said that I could save my money by taking his."

The findings of the Tribunal were, however, not based solely on the testimony of P. W. 1. In the view of the Tribunal that testimony was strengthened by the facts (a) that the appellant gave no receipt for the Rs. 20 which he alleged he had received as deposit on account of demurrage; (b) that it was not the custom of railway officials to receive part- f payment of any charge; (c) that there was no evidence on which any reliance could be placed that any demurrage would have become payable; and (d) that the appellant was prepared to have the goods dispatched as if they were on military account. We shall proceed to consider each of these factors in the order in which we have set them out.

The appellant's case being that the amount of Rs. 20 was "deposited with him on account of demurrage," his failure to give a receipt might well be explainable. Normally, a receipt would be given only when the amount of the g charge to be levied had been definitely ascertained and paid in full, and in this case that could not have been done till the wagons had been loaded and were ready for dispatch. Also P. W. 3 (General Assistant in the Goods Office at Jamalpur) began by stating in his examination-in-chief that a receipt is given only when it is insisted upon, though he soon corrected himself and added that a receipt is given in every case.

We have not been able to discover on the record any evidence to the effect that it is not the custom of railway officials to receive part-payment of any charge. No doubt P. W. 2 h (Assistant Superintendent of Transportation) has stated that the appellant was not entitled to take any money as security for future demurrage and that demurrage cannot be deposited in advance, but apart from the fact that it would not be criminal to accept in advance money which had not yet legally become due, the appellant's case is not that the amount was received in advance, but that it was received in part-payment of a charge already incurred.

The question whether any demurrage would or would not have become payable has been approached by the Tribunal only from the point of view whether on the facts established any demurrage would have become legally

a chargeable. This in our judgment is not enough. If the circumstances were such that the appellant could honestly, though mistakenly, have believed that demurrage had or was likely to become chargeable, a payment received by him in respect of it would not render him guilty of an offence under S. 161. The entry, Ex. A (1) in the Placing Wagon Register shows that wagon B A 1022 was detained for sheep loading on 24th May. The Tribunal's criticism of this entry was that though P. W. 3 had proved it as being in the handwriting of a Shed Clerk named Dutt, the Shed Clerk was not called to state the circumstances in which it was made. Exhibit A is an official register of the railway kept by a public servant in the course of his official duties and was produced from railway custody. If the prosecution did not accept the correctness of the entry upon which the appellant relied, it was for them to produce evidence which would explain the circumstances in which it was made. The further criticism of the Tribunal that the register in which the entry appears contained blank lines and that it was possible that the entry was inserted at a later date does not appear to us to be justified. We have examined the register ourselves and find that the page devoted to entries made on 24th May contains altogether 15 entries and that there is no blank space between the entries. This particular entry is right in the middle with seven entries above it and seven below. As a matter of fact as wagon B A 1022 was at Jamalpur on that date, it was the duty of the Shed Clerk to make an entry in the register regarding that wagon every day during which the wagon was detained at Jamalpur showing how it was being dealt with. If this entry had not been made on 24th May, there would on that date have been no entry regarding this wagon in the register, which would have amounted to a default of duty on the part of the Shed Clerk. The entry must have been made in the regular course of official duty and does not appear to us to be open to any suspicion. On behalf of the Crown it was frankly admitted before us that the entry was genuine and that the criticism to which it had been subjected by the Tribunal could not be supported. The entry does not indicate whether the wagon was placed in position for loading on the 24th, but it does show that it was detained for the purpose of sheep loading and to that extent lends support to the appellant's case.

The Tribunal have observed that assuming that the appellant gave orders for this wagon to be detained for sheep loading, he had no authority to do so and consequently no autho-

rity to charge demurrage. The evidence does not exclude the authority of the Station Master to detain a wagon pending receipt of sanction for allotment. On the other hand, there is a sentence in the evidence of P. W. 2 which throws some doubt on the correctness of the assumption made by the Tribunal. He stated

"it would be the easiest thing going for the Station Master to give a consignor two wagons though we had only allotted him one, as Jamalpur is a depot station."

P. W. 1 has stated that though he had said nothing to the appellant on the matter of the goods being required on military account, the appellant asked him to hand over Ex. 3 to the Goods Clerk and to say that the goods were being dispatched on military account. There is no other evidence on the point. The direction in Ex. 3 that an application should be taken from P. W. 1 to the effect that the goods were being dispatched on military account, tends to support the appellant rather than P. W. 1. As to the absence of a military credit note the appellant has stated that P. W. 1 told him that the credit note was with the man who was bringing the livestock from Monghyr. It may well be that P. W. 1 who has not scrupled to tell lies in his evidence when it suited him did attempt to persuade the appellant that the goods were being dispatched on military account.

The appellant's contention was that he had detained one wagon for loading on 24th May in respect of which demurrage had become chargeable. The Tribunal considered this highly unlikely, as no forwarding notes had been received up to that time. Exhibits 1 and 2 are dated 24th May and were certainly taken by P. W. 1 to the appellant on that date. There is nothing beyond the statement of P. W. 1 that these exhibits were returned to him by the appellant. P. Ws. 4 and 5 do not state that P. W. 1 had Exs. 1 and 2 with him when he went into the appellant's office on the 26th. But assuming that that was so, this would not exclude the possibility of P. W. 1 becoming liable for demurrage. P. W. 2 has stated in cross-examination that "it is necessary to give a forwarding note only when the goods are tendered, not before." It is clear that demurrage would become legally chargeable after the lapse of nine hours of daylight from the moment of placing a wagon in position for loading. In some cases goods may not be tendered for loading till several hours or even days later. In such cases demurrage would begin to accrue though according to P. W. 2 no forwarding note would have been given.

a The appellant's case was that he had on the morning of 24th May obtained sanction from Howrah over the control telephone for the allotment of a wagon to P. W. 1, and that on receipt of that sanction a wagon was placed in position for loading the same morning. The prosecution argue that this must be false as there was no possibility of the appellant communicating with Howrah by telephone on the 24th, the control telephone beyond Rampore Hat Station having been out of order since 21st May and continuing to be out of order till some date after 28th May. This has been sought to be established by the production of b the control chart (Ex. 8) relating to 24th May. The chart was produced by P. W. 2. Objection was taken before us to the admissibility of the control chart on the ground that it was not prepared by P. W. 2, and that P. W. 2 was not in charge of the Control Office. Assuming, however, that the chart does show that the control telephone was out of order beyond Rampur Hat, it has not been established that there was no other means open to the appellant to get through to Howrah on the telephone from 21st May onwards. For instance, it has not been shown that Howrah could not have been reached by c telephone via Kiul the junction nearest to Jamalpur on the main line. Jamalpur is an important station on the East Indian Railway system and it would be surprising if it had been permitted to remain beyond the reach of telephonic communication from Howrah for over a week and possibly much longer. P. W. 1 himself alleges some telephone conversation that the appellant purported to carry on with somebody on the morning of the 24th. The suggestion of the prosecution is that the conversation was with the Goods Yard at Jamalpur. P. W. 1 asserts that after the conversation, the appellant assured him d that two wagons would be made available to him. The evidence indicates that only one wagon was available at Jamalpur. If that was so, the assurance given by the appellant to P. W. 1 seems rather to indicate that the appellant must have been in touch with Howrah. In any case the matter has been left in doubt.

The prosecution have relied upon the endorsement Ex. 4 (2) which according to them shows that no wagon was allotted to Jamalpur on 24th May. The endorsement was admittedly made by P. W. 2 on 1st June 1943, five days after the receipt of Ex. 4 at Howrah and was not made in the regular course of duty. The suggestion is that it was made to counter or forestall any allegation on behalf

of the appellant that a wagon had been allotted on 24th May. We can only observe that if the endorsement was made with that object, it must be condemned as an attempt to persuade the Court that might be called upon to try the case to accept a mere allegation made by P. W. 2 as evidence relevant in the case. All that Ex. 4 shows is that on 24th May sanction for two wagons was applied for. On the 26th, sanction for one wagon was granted and was communicated by means of the telegram of which Ex. 5 is a copy. It may well be that sanction for one wagon having already been given over the telephone on the 24th, sanction for only one more wagon was required on the f 26th. Again, the matter is left in doubt. P. W. 2 no doubt stated at the trial that no allotment was made on the 24th, but as this is based on the endorsement Ex. 4 (2) (which is not evidence) and on the indication furnished by the control chart (Ex. 8) which by itself does not exclude the possibility of telephonic communication between Jamalpur and Howrah on the 24th, it does not, in our opinion, carry the matter any further.

P. W. 1 admits that after telephoning (whether to Howrah or to the Goods Yard), the appellant asked him to be ready to load on the 25th. It was because P. W. 1 told the g appellant that he could not be ready to load on the 25th that he was given time till the 26th. From this it would be a reasonable inference that after telephoning the appellant was in a position to arrange for a wagon to be loaded on the 25th and it was because P. W. 1 asked for further time that the loading was allowed to be postponed. This coupled with the entry Ex. A (1) shows that a wagon was detained on the 24th for the loading of livestock and that so far as the appellant was concerned could have been made available, and possibly was made available, for loading at the latest on the 25th. In these circum- h stances, whatever the legal position with regard to the liability of P. W. 1 for demurrage may have been, if the appellant honestly believed that demurrage had or might become chargeable, and on the 26th received Rs. 20 as a deposit on account of demurrage, he would not be guilty of an offence under S. 161, Penal Code. It must be remembered that even on the afternoon of the 26th, P. W. 1 did not profess to be ready to load as, according to him, the livestock was still on its way from Monghyr to Jamalpur, and demurrage would continue to accrue.

After giving the case our very careful consideration we are not satisfied that the possibility of the appellant having received the

a money on account of demurrage, which he honestly believed to be due or likely to become due has been excluded beyond reasonable doubt. In coming to this conclusion, we have not been unmindful of the special rule of evidence enacted in S. 9 (2) of the Ordinance but it has in our judgment not been proved that the appellant accepted any gratification for himself. We allow the appeal and direct that in place of the order of the High Court there shall be substituted an order acquitting the appellant and directing that the appellant shall be released from his bail, and that the fine, if paid by him, shall be refunded.

b G.N. *Appeal allowed.*

A. I. R. (31) 1944 Federal Court 72

(*From N.-W. F. Province*)

17th April 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

Q. Qudratullah — Appellant

v.

N.-W. F. Province — Respondent.

Case No. 34 of 1943.

Federal Court—Appeal—Concurrent findings of fact by lower Courts — Interference with by Federal Court.

c In an appeal the Federal Court is normally very slow to come to a conclusion of fact contrary to the unanimous findings of lower Courts. But as the Federal Court was doubtful whether there was proper evidence on the record to support the unanimous finding of fact by the lower Courts, it considered the evidence on which the finding was based. [P 73a,b]

K. K. Raizada instructed by Tarachand Brijmohanlal, Agent — for Appellant.

Malik Khuda Baksh, Advocate-General of N.-W.F.P. (with Tara Chand Mathur) instructed by Ganpat Rai, Agent —
for Respondent.

Spens C. J.—Section 240, Government of India Act, 1935, provides as follows :

d “240. (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. . . .”

The appellant in this case, Qudratullah Khan, was appointed a foot constable in the police at Peshawar on 9th January 1922. On 1st March 1933, he was promoted as Assistant Sub-Inspector. On 10th May 1934, he was confirmed in his rank as Assistant Sub-Inspector. On 25th March 1936, he was promoted to the rank of Sub-Inspector and he was confirmed

in that appointment on 25th March 1937. On 8th March 1941, he was dismissed from the service by the Deputy Inspector-General of Police.

Basing his claim on the provisions of the above section of the Constitution Act and on the decision of this Court in 1941 F. C. R. 37,¹ the appellant commenced on 28th July 1942, an action in the Court of the Senior Subordinate Judge, Peshawar, against the Government of the North-West Frontier Province. The appellant claimed a declaration that he had not been legally dismissed from the service on the ground that he had been dismissed by an authority subordinate to that by which he claimed to have been appointed, namely, the Inspector-General of Police. He also added a further claim based on sub-s. (3) of S. 240, Constitution Act, that he had been dismissed without being given a reasonable opportunity of showing cause against the action proposed to be taken against him. His action was on 20th February 1943, dismissed in the Court of the Senior Subordinate Judge, and an appeal to the Court of the Judicial Commissioner at Peshawar suffered the same fate on 21st June 1943. A certificate under S. 205, Constitution Act, was however granted by the Judicial Commissioner's Court. Hence g the present appeal to this Court. Before us the same two points under S. 240, Constitution Act, were taken and argued on behalf of the appellant.

So far as the first point is concerned, the matter turns wholly upon a question of fact as to the authority by whom the appellant was appointed to the post of Sub-Inspector. By the year 1935, the Deputy Inspector-General had been given powers under rules duly made under the Police Act (Act 5 of 1861) and sanctioned by the Provincial Government to appoint and dismiss Sub-Inspectors. Both the Courts below were satisfied on the evidence of h the official witnesses and documents produced by them that the appellant had been appointed in March 1936 to and confirmed in 1937 in his post as Sub-Inspector by the Deputy Inspector-General and that, therefore, the Deputy Inspector-General was an authority by whom he could be legally dismissed. It was submitted to us that the record of the case as put before this Court did not contain proper evidence that the appointment had been made by the Deputy Inspector-General of Police and it was suggested that accordingly this Court

1. ('42) 29 A.I.R. 1942 F. C. 3 : 198 I. C. 7 : I.L.R. (1941) Kar. F. C. 165 : 1941 F. C. R. 37 : I. L. R. (1942) Lah. 692 (F. C.), Suraj Narain Anand v. North-West Frontier Province.

should come to a contrary conclusion of fact to that on which both the Courts below were unanimous. This Court is normally very slow to come to a conclusion of fact contrary to the unanimous findings of Courts from which appeals come to it. But in view of the fact that this Court was doubtful whether the directions given by the Senior Subordinate Judge to file copies of the orders produced before him as evidence of the appointment of the appellant, and of the confirmation of his appointment, as Sub-Inspector had been carried out, this Court, on the conclusion of the arguments, gave the Advocate-General an opportunity of forwarding to this Court the documents produced in the Courts below and relied upon as evidencing the appointment of the appellant by the Deputy Inspector General of Police. This the Advocate-General has done, and this Court is now satisfied that the record before it did contain copies of all documents relied upon in the Courts below and that the suggestions that such documents did not justify the findings in the Courts below and that there may have been some other documents relating to the appointment of the appellant not produced are without foundation. In our judgment accordingly the conclusion of fact to which the Courts below have come is fully justified and the appellant having been duly appointed to and confirmed in his post as Sub-Inspector by the Deputy Inspector General of Police, the Deputy Inspector General was an authority who could in the circumstances legally dismiss him. The appellant has therefore no cause of action under sub-ss. (1) and (2) of S. 240, Constitution Act.

As regards the second point, it appears that before it was proposed to dismiss the appellant an enquiry was carried out into his conduct both by an Inspector of Police and by a Superintendent of Police. The appellant's complaint was that the preliminary enquiry by the Inspector was held in his absence and that at the subsequent open enquiry before the Superintendent the file prepared by the Inspector was used and he was not permitted to be represented by counsel. Both the Courts below went in detail into the evidence of these matters and were satisfied that the appellant was given a reasonable opportunity of showing cause against his proposed dismissal. Having listened with care to all that was addressed to us by appellant's counsel, we too are convinced that on this point also the Courts below came to a right conclusion. Accordingly this appeal fails and must be dismissed with costs.

G.N.

*Appeal dismissed.***A. I. R. (31) 1944 Federal Court 73**

25th August 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.

In the matter of the powers of the Federal Legislature to provide for the levy of an Estate Duty in respect of property, other than agricultural land, passing upon the death of any person

and

In the matter of a Reference under S. 213 of the Government of India Act, 1935.

Special Reference No. 1 of 1944.

(a) Government of India Act (1935), S. 213—Advisory jurisdiction of Federal Court — Scope laid down.

Per *Spens C. J., and Varadachariar J.*—When Parliament has thought fit to enact S. 213 it is not for the Court to insist on the inexpediency (according to a certain school of thought) of the advisory jurisdiction. The fact that the questions referred relate to future legislation cannot by itself be regarded as a valid objection. Section 213 empowers the Governor-General to make a reference when questions of law are likely to arise. It would make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under S. 104 and a draft bill to be introduced to carry out the proposals. [P 74 C 2; P 75 C 1]

(Per *Zafrulla Khan J.*) — Section 213 does not make it obligatory upon the Court to arrive at a determination of the questions referred to it: [P 82 C 2]

Whenever the Federal Court is invited to render an opinion upon questions of law, the questions must be cast in a precise and exact form and the reference itself must contain all the material necessary to enable the Court to arrive at a satisfactory determination of the questions. It should not be left to counsel to supplement the reference during the course of the hearing by oral submissions. Counsel may as of right enter upon an exposition and interpretation of the material contained in the reference but that is quite different from varying or supplementing it, which is not permissible. [P 84 C 2]

The procedure with respect to reference to Federal Court has, as far as possible, been approximated to a judicial hearing and determination of the questions referred. An advisory opinion, however, is not in the nature of a judicial pronouncement and the Constitution Act does not make an opinion appealable to His Majesty in Council. Nor is it binding upon the Governor-General. Whether the pronouncements of the Court in an advisory opinion could be regarded as "law declared by the Federal Court" within the meaning of S. 212, Constitution Act, so as to be recognised as binding on Courts in British India appears to be open to serious doubt: *Case law considered.* [P 82 C 2; P 83 C 2]

(b) Interpretation of Statutes — Fiscal enactment ambiguous — Machinery provisions are useful to elucidate scope of charging sections.

Perusal of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging sections (e. g., nature of the tax) particularly in cases of ambiguity. (1889) 14 A. C. 493; (1912) A. C. 212; (1930) 17 AIR 1930 P. C. 173; (1933) A. C. 378 and (1933) A. C. 710, *Ref.*

[P 77 C 1; P 84 C 2]

(c) Interpretation of Statutes — Intention of Legislature—View-point of Court is different after legislation—Presumption is in favour of validity in that case. (Per *Spens C. J.*, and *Varadachariar J.*)

When a Court is called upon to pronounce actual legislation ultra vires, the point of view of ascertaining the probable intention of Parliament becomes slightly different; because, though the intention of the Constitution Act is even then the test, the presumption in favour of validity—weak as it may sometimes be—inclines the Court to put as wide a construction as possible on the words used in the enactment. [P 79 C 1]

(d) Government of India Act (1935), S. 213 and Sch. 7—Estate Duty is not in any list in Sch. 7—Federal Legislature has no power to levy—(Per *Spens C. J.*, and *Varadachariar J.*; *Zafrulla Khan J.*, Doubting.)

(Per *Spens C. J.* and *Varadachariar J.*)—The Federal Legislature has no power to make a law providing for the levy of “Estate Duty” of the nature and with the incidents of Estate Duty under the English law. The levy of Estate Duty of the kind above referred is not a matter included in any of the Lists in Sch. 7, Government of India Act, 1935. [P 79 C 2]

(Per *Zafrulla Khan J.*)—The expression “Estate Duty” is not a term of art and carries no precise connotation. A law enacting that upon the death of a person there shall be levied a duty in respect of property passing upon the death may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term “succession” used in that entry. The proposed duty is given the name of estate duty and is levied on “property passing upon death,” yet the machinery provisions may perforce have to be so framed as to make the duty—in effect a “duty in respect of succession to property” within the meaning of entry No. 56 of the Federal List. The Court could not fairly be invited to make a pronouncement upon the nature of the duty proposed to be levied in the absence of full information on the subject of machinery, etc., which would be necessary to make the duty effective. [P 84 C 1; P 85 C 1]

Sir Brojendra Mitter, Advocate-General of India (S. M. Sadiq with him) instructed by K. Y. Bhandarkar, Agent—for the Governor-General.

Motilal Setalvad (G. N. Joshi with him) instructed by K. Y. Bhandarkar, Agent—for the Governor-General-in-Council.

Dr. Narain Prasad Asthana, Advocate-General of United Provinces (Baij Nath Sahai with him) instructed by Raizada Sumair Chand Jain, Agent—for the United Provinces.

M. Hidayatullah, Advocate-General of C. P. and Berar (R. Kaushalendra Rao, with him) instructed by B. Banerji, Agent—for the Province of the Central Provinces and Berar.

Sir Alladi Krishnaswami Aiyar (N. Rajagopala Iyengar, with him) instructed by Ganpat Rai, Agent, Amicus Curiae.

OPINION

Spens C. J. — The opinion which I am about to deliver is that of my brother Varadachariar and myself. This is a reference made by His Excellency the Governor-General under S. 213, Constitution Act. The questions referred are:

“(1) Has the Federal Legislature power to make a

law providing that upon the death of any person there shall be levied an Estate Duty in respect of property, other than agricultural land, passing upon the death?

(2) If the Federal Legislature has such power, has it also the power to make a law providing that for the purposes of the aforesaid Duty —

(a) ‘Property passing upon the death’ shall be deemed to include —

(i) Property passing either immediately on the death or after a specified interval, either certainly or contingently, either originally or by way of substitutive limitation;

(ii) property of which the deceased was at the time of his death competent to dispose;

(iii) property in which the deceased or any other person had an interest ceasing on the death of the deceased, including, in particular, a coparcenary interest in the joint property of a Hindu family governed by the Mitakshara School of Law;

(iv) property transferred by the deceased as a gift in contemplation of death or within a specified period before death;

(v) property passing under any settlement made by the deceased whereby an interest in such property for life or any other period determinable by reference to death was reserved to the settlor?

(b) The situs of moveable property shall be such as may be specified in the law or prescribed by rules made under the law.

(3) If the Federal Legislature has not the powers referred to in questions (1) and (2), is the levy of such duties a matter not included in any of the lists in Sch. 7, Government of India Act, 1935?

(4) If the Federal Legislature has the power referred to in question (1) but not all the powers referred to in question (2), is the levy of a duty on those classes of property mentioned in question (2) in respect of which it has not such powers a matter not included in any of the lists in Sch. 7, Government of India Act, 1935?”

Notice of the reference was given to the Government of India and to the Provinces and we have heard arguments from counsel for the Governor-General and the Governor-General in Council and from the Advocates-General of the United Provinces and the Central Provinces and Berar. At our instance, Sir Alladi Krishnaswami Aiyar was instructed to appear as amicus curiae and present what may be called the tax-payer's point of view. We are indebted to all the learned counsel for the assistance that they have rendered.

The circumstances in which the reference has been made and the form of the questions referred have led to some discussion at the Bar as to the proper course to be adopted in this case. Two particular features of the situation are:

(1) that the questions relate to contemplated legislation and not to the validity or operation of a measure already passed; and

(2) that the main question referred, namely, Q. (1), contains only very limited information as to the nature of the tax proposed to be levied.

It may be stated at the outset that when Parliament has thought fit to enact S. 213, Constitution Act, it is not in our judgment for

the Court to insist on the inexpediency (according to a certain school of thought) of the advisory jurisdiction. Nor does it assist to say that the opinions expressed by the Court on the questions referred "will have no more effect than the opinions of the law officers": (1912) A. C. 571¹ at p. 589. That is the necessary result of the jurisdiction being advisory.

The fact that the questions referred relate to future legislation cannot by itself be regarded as a valid objection. Section 213 empowers the Governor-General to make a reference when questions of law are "likely to arise". It has been urged upon us in the present instance that the reference has become particularly necessary because of a suggestion that the proposed legislation requires to be made possible by a notification to be issued by the Governor-General under S. 104, Constitution Act. Such a notification can be issued if the subject-matter of the proposed legislation is not enumerated in any of the Lists in Sch. 7 to the Act. As the issue of a notification under S. 104, thereby adding to the Lists in Sch. 7, is regarded as a matter of some gravity, it seems to have been assumed by the Joint Parliamentary Committee that before issuing such a notification, the Governor-General would ordinarily take the opinion of the Federal Court as to whether the proposed legislation is not covered by any of the entries in the Lists and this is what the Governor-General has thought fit to do in this case. In this class of cases, the reference should, in the very nature of things, be made before the legislation has been introduced and the objection based upon the hypothetical character of the questions can have no force. We may, however, add that instances were brought to our notice in which references had been made under the corresponding provision in the Canadian Supreme Court Act when the matter was at the stage of a bill.

It would no doubt make the task of the Court easier and perhaps enable it to give a more specific and useful opinion, if in these cases the Court could have before it not only questions intended to indicate the pith and substance of the proposed legislation but also a draft notification to be issued under S. 104 and a draft bill to be introduced to carry out the proposals.

Hence it is that the form of the questions in this case has caused us greater difficulty. When we deal with the questions themselves, it will be seen that we have been obliged to make certain assumptions and reservations in answering them. As observed in (1912) A. C. 571¹ at p. 589 the necessity for making such

reservations may arise in particular cases and the proper course for the Court to adopt in such cases is to make its report with such reservations as may be found necessary.

On behalf of the Governor-General in Council, counsel invited us to answer questions (1) and (2a) in the negative and questions (3) and (4) in the affirmative. This is slightly different from the position taken up in the statements filed on behalf of the Governor-General in Council, but in a matter of this kind, we are not disposed to attach much importance to this circumstance. He contended that nothing like the proposed tax was mentioned in Lists 2 and 3 of Sch. 7, Constitution Act, and that the only relevant entry in the first list, namely, entry No. 56, could not, on its true interpretation, be held to authorize the levy of the proposed tax. He drew our attention to some of the English decisions in which the distinction between a Succession Duty and an Estate Duty had been clearly indicated and asked us to apply the same test here and hold that the proposed Estate Duty was not a duty "in respect of succession to property" within the meaning of that phrase in entry No. 56. Pressed with difficulties arising out of the meagreness of the information contained in the questions as to the nature of the proposed tax, he contended that the language of questions (1) and (2) was enough substantially to represent the charging sections of the proposed Act, that taken with the description "Estate Duty" in question (1), the questions gave sufficient information for the purpose of the present Reference and that other sections of the Bill would only be machinery provisions. Finally he asked us to express our opinion on the assumption that what was proposed to be levied was a tax similar in all material respects to the Estate Duty imposed in England by the Finance Act of 1894 (and its later amendments) as interpreted and explained by the decisions of the English Courts thereon; and he referred to the observations of Rigby L. J., in (1898) 1 Q. B. 355,² and to the decisions in (1910) A. C. 27³ and (1924) A. C. 385⁴ as clearly showing that the proposed tax was essentially different from a succession duty and was not therefore covered by the phraseology used in entry No. 56 or any other entry in the lists in Sch. 7.

The Advocates-General of the United Provinces and of the Central Provinces and Berar contended that the proposed tax fell within

2. (1898) 1 Q. B. 355, Earl Cowley's case.

3. (1910) 1910 A. C. 27, *Winans v. Attorney-General*.

4. (1924) 1924 A. C. 385, *Nevil v. Inland Revenue Commissioners*.

1. (1912) 1912 A. C. 571, *Attorney-General for Ontario v. Attorney-General for Canada*.

the ambit of entry 56 of List 1 and that question (1) and even question (2), to a great extent, must be answered in the affirmative. They urged that the term "succession" is one of wide and general import, as comprehensive as the expression "passing upon the death" in question (1) and that there was no justification for limiting its interpretation by reference to the distinction drawn in England between Succession Duty and Estate Duty. This distinction, they said, was merely the result of the history of this group of taxes in England and of the co-existence of the two kinds of duties. They insisted that a constitutional enactment should be liberally interpreted so as to give the fullest scope and effect to the language employed and avoid as far as possible an inference of an intention to withhold essential powers of taxation from the Indian Legislatures. They pointed out that when Parliament had thought fit to provide in S. 137 that Succession Duty, though collected by the Central Government, should form part of the revenues of the Provinces, it would not be right to attribute to Parliament an intention that this provision could be defeated by levying a similar tax under a different name or on a different basis. Referring to a recommendation made in 1924-25 by the Indian Taxation Enquiry Committee in favour of the levy of Estate Duty in India, they argued that it was unlikely that the power to impose this duty was not conferred by the Constitution Act passed some years after that recommendation. Lastly, they pointed out that writers on Political Economy and Public Finance and several enactments in Canada and Australia used the expressions "Death Duties", "Inheritance Taxes", and duties or taxes on "succession" to include both the Succession Duty and the Estate Duty of the English Law. As regards question (2), they contended that, if the Indian Legislature had the power to levy Succession Duty in the wide sense contended for by them, it must also be held to have the power to enact provisions required to make the exercise of that legislative power effective and to prevent evasions of the taxing statute. Many of the categories in the sub-heads forming question (2-a), they said, would, on this principle, be within the competence of the Indian Legislature. In respect of that portion of sub-cl. (iii) of question (2-a) which relates to Coparcenary Interest in Mitakshara joint families, they relied on the judgment of this Court in 1941 F. C. R. 12⁵ as conclusive

in support of the view that survivorship is also a form of succession.

Sir Alladi Krishnaswami Aiyar, at one stage, viz., in the case filed by him, supported the contention that "the answer to the first question must be in the negative," because "an Estate Duty as such could not be comprehended within the scope of the power conferred by the item" (i. e., entry No. 56) and there was no other entry in List 1 or List 3 capable of being construed as authorising the levy of such a duty. In his statement in reply, he referred to the American, Canadian and Australian decisions relied on by the Government of the Central Provinces in its case and submitted

"that it is unsafe to rely on American, Australian or Canadian analogies and that the Court must reach its conclusion on a proper interpretation of the meaning of the expression "duties with respect to succession,"

in Item 56. During the arguments before the Court, he stated that further examination of the question in the light of the arguments urged on behalf of the United Provinces and the Central Provinces rather inclined him to the view that the word "succession" in entry 56 of List 1 could, without any undue straining of its significance, be held to include all cases of "passing of property on death" and that the entry could therefore be held to comprehend both "Succession Duties" (in the narrow sense) and "Estate Duties." He instanced the case of a Hindu reversioner being spoken as "succeeding" to the estate on the death of a widow, though the widow had only a "limited interest" and the reversioner has been held not to claim under her. He invited our attention to the report of the Percy Committee (the Federal Finance Committee of 1932) and to the White Paper on Constitutional Reforms⁶ where the expression "Death or Succession Duties" is used and he asked us to read it as implying that in the opinion of the authors both the expressions "Death Duties" and "Succession Duties" were of the same comprehensive significance. He reiterated the argument based by the Advocate-General of the Central Provinces on S. 137 and he apprehended that if the "Estate Duty" and the "Succession Duty" should be held to be two different duties, there might be practical difficulties and conflicts in their levy in view of the financial scheme adopted by the Constitution Act. We do not feel that the illustration derived from the case of the Hindu widow and the reversioner is likely to be very helpful. The "woman's estate" under the Hindu law is an anomalous conception created by a long course of decisions in an attempt to reconcile various conflicting in-

5. (41) 28 A.I.R. 1941 F. C. 72 : I.L.R. (1941) Kar. F. C. 148 : 194 I. C. 357 : 1941 F. C. R. 12 (F.C.), In re The Hindu Women's Rights to Property Act.

6. (1933) Cmd. 4268.

terests. Nor is the passage cited from the Percy Committee's Report calculated to throw much light on the question. There is nothing to indicate whether the authors thought that the two duties were one and the same or were different. Anyhow, there remains the fact that the Constitution Act did not employ that composite expression but only the expression "duties in respect of succession"—probably taken from Item 2 in List 1 of the Devolution Rules of 1920. Our conclusion must therefore rest on the weight to be given to the other contentions urged before us.

With reference to the form of question (1), we feel that we are at some disadvantage by reason of its inadequacy. It may generally be true to say that questions (1) and (2) correspond to the charging sections of the proposed Act; but a perusal even of the machinery sections may often be useful and sometimes even necessary to elucidate the scope of the charging section: see (1889) 14 A. C. 493;⁷ (1912) A. C. 212;⁸ (1930) A. C. 357⁹ and (1933) A.C. 378¹⁰ at p. 389—and this is particularly so in cases of ambiguity: (1933) A. C. 710¹¹ at p. 720. The expression "property passing upon death" in the question might not be inappropriate even to denote cases of succession (in the limited sense) if the other provisions of the Act indicate only a Succession Duty in the English sense. Reference has no doubt been made in the question to "Estate Duty," but it may be doubted whether it is permissible as a matter of interpretation to import into this country, merely from the use of that expression, all the incidents associated with that tax in the English financial system: see the observations in (1933) A.C. 378¹⁰ as to the connotation of the expression "Estate Duty" used in the Straits Settlements Ordinance considered in that case and as to the danger of using decisions on an Imperial Statute in the interpretation of a colonial measure. See also the observation of Lord Robson in (1912) A. C. 212⁸ where, dealing with the tax imposed by a Canadian enactment, he said: "although called a succession duty, the tax here in question was laid on the corpus of the property." In a Queensland Statute referred to in (1909) 8 C.L.R. 739¹² at p. 755 the Queensland Legislature had (as pointed out by O'Connor J.) though adopting the words of the English

section, used them in a different context and as part of a different scheme of assessment from that contained in the English Act. As we are not, however, confined strictly to a question of interpretation of the terms used in the Reference and as counsel for the Governor-General in Council has expressly invited us to give our opinion on the assumption that the tax referred to in the Reference as proposed to be levied is one resting on the same essential basis and having the same essential incidents as Estate Duty in the English law, we are prepared to express our opinion on that assumption.

It is true that the difference recognised in England between the Succession Duty and the Estate Duty is, to some extent, due to the history of those taxes in that country. But it does not follow therefrom that the difference does not also rest on a real and important difference in the bases on which they rest. It is likewise true that in some Canadian and Australian Statutes the expression "Succession Duty" has been employed to denote or to include what would be Estate Duty in the English law; but these were instances in which very little turned on the difference between the two kinds of imposts; the expression was generally found in the "Short Title" of the enactment or taken from it. Similarly the principle of "aggregation" and the principle of "progression" (or graduated scale) associated with the Estate Duty have sometimes been adopted even in respect of Succession Duty; they cannot, therefore, be made the basis of differentiation between the two. It is also to be noted that though economists and writers have dealt with "Succession Duty" and "Estate Duty" under the headings "Death Duties," "Inheritance Taxes" and "Duties on Succession," it cannot be said that they did not recognise a real distinction between Succession Duty and Estate Duty. There are certain common features justifying the treatment of both these methods of taxation under one head; but the distinctive features are also noted. Thus, Findlay Shirras in his "Science of Public Finance"—p. 524—classifies Death Duties or Inheritance Taxes

"under two categories, an estate tax levied on the inheritance as a whole, and a succession duty or share tax on the separate portions going to the different beneficiaries."

He adds that both categories have their peculiar characteristics and proceeds to indicate them, observing that the Estate Duty is a more productive and efficient source of revenue while the Inheritance Tax may be said to be the more equitable. There is one feature common to both taxes, namely, that the occasion for the levy is the death of a person; but

7. (1889) 14 A. C. 493, *Colouhoun v. Brooks*.

8. (1912) 1912 A. C. 212, *Rex v. Lovitt*.

9. (1930) 17 A.I.R. 1930 P. C. 173 : 124 I. C. 590 : 1930 A. C. 357, *Attorney-General for British Columbia v. McDonald Murphy Lumber Co.*

10. (1933) 1933 A. C. 378, *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*.

11. (1933) 1933 A. C. 710, *Provincial Treasurer of Alberta v. Kerr*.

12. (1909) 8 C. L. R. 739, *Archibald v. Commissioners of Stamps*.

while Succession Duty has reference to the acquisition of the property by the successor and generally takes into account the extent of the benefit derived by him and other considerations relevant from that point of view, the Estate Duty has reference to the value of the property constituting the estate of the deceased and is independent of the question as to who takes it. Thus the distinction drawn in the English decisions between Estate Duty and Succession Duty seems to correspond substantially to a distinction in principle and basis recognised by writers on Economics. The Members of the Indian Taxation Enquiry Committee themselves recognised it: *see* para. 356 of the Report. The judgments in (1933) A. C. 710¹¹ and in some of the earlier cases therein referred to will also show that that distinction may have a material bearing upon the classification of taxes into "direct" and "indirect" and upon the decision of questions relating to the territorial jurisdiction of Legislatures imposing such taxes.

The argument based upon the improbability of Parliament having withheld the power to levy such a tax when framing the constitution in 1935 has no great force. Section 104 has been enacted to meet that very difficulty. That section has also some bearing on the argument founded on S. 137; the Governor-General may by a notification under S. 104 confer the power even on a Provincial Legislature. If, however, the situation cannot be satisfactorily met in that way, the matter must, of course, go before Parliament. As regards the recommendation of the Taxation Enquiry Committee, it seems to us that it must be taken along with the difficulties pointed out in the report itself as standing in the way of the immediate introduction of such a tax into this country. The recommendations made as to the preliminary steps necessary might well have created the impression that it would be some time before the tax could be introduced, if at all.

Recognising that there are real and substantial differences between Succession and Estate Duties, we now address ourselves directly to the question: in what sense is the word "succession" used in entry 56 of List 1 which speaks of "duties in respect of succession to property." Our attention was drawn to the meaning of the word "succession" in dictionaries and law lexicons and it was contended that the word was capable of comprehending every kind of passing of property intended to be comprised in question (1). We are by no means satisfied that this is so. Assuming, however, that the word "succession" by itself is capable of a wide significance, can it bear any such meaning in the expression

"succession to property," especially when it is read in the light of other indications derivable from the Lists in Sch. 7? The Succession Act broadly divides the subject of "succession" into "testamentary" and "intestate" succession; and the ordinary meaning of succession is the transmission, by law or by the will of man, to one or more persons of the property and the transmissible rights and obligations of a deceased person. That this is the sense in which "succession" is used in the Lists in Sch. 7 is indicated by the collocation of the words "wills," "intestacy" and "succession" in entry 7 of List 3. Entry 21 in List 2 contains a corresponding provision in respect of "agricultural land;" and it speaks of "transfer, alienation and devolution" (entry 21 corresponds not only to entry 7 of List 3 but also to entry 8; hence it deals with transfers *inter vivos* as well as testamentary dispositions and devolution). It is only reasonable to assume that entry 56 in List 1 and entry 43 in List 2, which authorise the levy of duties in respect of succession, refer us back to the succession and devolution provided for elsewhere in the schedule. The use of the word "to" in the expression "succession to property" lends some support to this view. How different from this is the concept of a duty which [in the words of Rigby L. J., in (1898) 1 Q.B. 355² at p. 375] has no reference to or implication of a relation of predecessor and successor or the existence of a succession. So far as legislative practice is concerned, there can, we think, be no doubt that in England, where the distinctions between the two duties were well-known, a power to impose duties "in respect of succession to property" would be regarded as most inaptly worded if it was intended to include a power to impose an estate duty. If in India there were any conflicting legislative practice, we should not place any great reliance on the English practice. But if there be any legislative practice at all in India, it is to be found generally in the use of the word "succession" in the narrower sense. For reasons indicated earlier in this opinion, we do not think that legislative practice in other Dominions or States is relevant for our purpose.

The expression "in respect of" in entry 56 is also not without significance. It indicates that the "succession" is the subject-matter of the taxation and not merely the occasion. It may be that the amount of the tax is fixed or regulated with respect to the value of the property but the subject-matter of the tax is not the property but the succession. The significance of this distinction is brought out in 1933 A. C. 710.¹¹ A tax of which the subject-matter is the "succession" cannot be held to be the same as a tax which "has no relation

to the accession to the property of a deceased person"—as the Estate Duty is described by Lord Gorrell to be : (1910) A. C. 27³ at p. 40. It is perhaps right to add that at the present stage we approach the question only from the point of view of ascertaining the probable intention of Parliament. When a Court is called upon to pronounce actual legislation *ultra vires*, the view point becomes slightly different; because, though the intention of the Constitution Act is even then the test, the presumption in favour of validity—weak as it may sometimes be—inclines the Court to put as wide a construction as possible on the words used in the enactment. In our opinion, there is more reason and justification for placing a limited construction on entry 56 of List 1 than for adopting the wider construction suggested.

Counsel for the Governor-General in Council referred to entry 55 in List 1 only to say that it is not appropriate to describe a levy in the nature of Estate Duty. We agree in this view; and, as the other counsel appearing before us did not suggest anything to the contrary, we do not think it necessary to discuss the entry at any length. Entry 13 in List 3 and the cognate entry 51 in List 2 are equally inappropriate. Both Estate Duty and Succession Duty may be collected in the form of stamps, and in some countries legislation relating to Estate Duty and Succession Duty is included in Stamp Laws: but the duties themselves are in their nature different from stamp duties (*see* Bastable's Public Finance, Bk. IV, Chap. 9, S. 1). The express mention of "duties in respect of succession" in the Lists in sch. 7 is itself an indication that the entry relating to "Stamp Duties" was not intended to comprise duties of the other kind.

If the first question is answered in the negative, it will not be necessary to answer the second question which has been framed on the assumption that the Federal Legislature has power to impose the proposed tax. It seems, however, desirable to make a few observations with reference to the arguments advanced by the Advocate-General of the Central Provinces and Berar in respect of this question. The expression "shall be deemed to include" is the method of introducing a statutory fiction, so as to enlarge the scope of a preceding provision in the statute. While it is true that the grant of legislative power in respect of a certain subject-matter will carry with it certain accessory or incidental powers, including a power to enact provisions to make effective the exercise of the main power or to prevent evasion of the law enacted under that power, provisions of this kind are substantially different from provisions

calculated to extend the scope of the main power itself by a statutory fiction. It is bound to be a question of much difficulty—and one which, in our opinion, could only usefully be attempted when the legislation has taken much more final form—to determine whether the various provisions set out in question (2) (a) can be regarded as "incidental" or "accessory" in the sense above explained.

The point raised by question (2) (b) does not turn on the construction of the Lists in sch. 7 but on S. 99. The Legislature may, within limits, have the power to define the *situs* of moveable property for the purposes of an Act but the validity of such legislation will depend upon its conforming to the provisions of S. 99, Constitution Act. The question does not, therefore, admit of a general answer and counsel for the Governor-General in Council did not accordingly invite us to answer this question. There is nothing in List 2 of sch. 7 to cover the proposed duty. We are, therefore, of the opinion that the answers to the questions comprised in the Reference are as follows:

(1) The Federal Legislature has no power to make a law providing for the levy of "Estate Duty" of the nature and with the incidents of Estate Duty under the English law.

(2) The question does not arise in view of the answer to question (1).

(3) & (4) The levy of Estate Duty of the kind above referred is not a matter included in any of the Lists in sch. 7, Government of India Act, 1935.

Our brother Zafrulla Khan finds himself unable to express any opinion on the questions referred. A report will, therefore, be made to His Excellency in accordance with the opinion of the majority.

Zafrulla Khan J.—Consultation of Judges by the Executive has been the subject-matter of much controversy at the hands of text-writers, jurists and Judges. The attempts made by the first two Stuart Kings of England which were characterised by Sir Edward Coke as "auricular taking of opinions" from the Judges and which eventually led to his own removal from his high office were to a large extent responsible for the bias which is noticeable throughout the judicial history of England against such consultation. These attempts were regarded as interference by the Executive with the proper exercise of their judicial function by the Judges and as tending to undermine their independence. Today the Crown has come to occupy an impersonal and detached position and the independence of Judges has been secured by means of such

effective safeguards that any suggestion of such a suspicion attaching to a reference made by the executive to the Judiciary may perhaps be disregarded. That does not mean that the exercise of advisory jurisdiction, even in pursuance of provision made in that behalf in modern statutes, may not often be attended with great inconvenience, occasion embarrassment and result in prejudice to the rights of future litigants. It is a jurisdiction the exercise of which on all occasions must be a matter of delicacy and caution. That the prejudice against obtaining advisory opinions from Judges is still very strong in England may to some extent be gathered from the protests made in the House of Lords in April 1928 to a clause contained in the Rating and Valuation Bill of that year whereby it was proposed that in certain events the Minister of Health may submit a substantial question of law to the High Court for its opinion thereon. The condemnation of the clause was so vigorous that the Government thought it wise to abandon it. On the other hand, S. 4, Judicial Committee Act, 1833, (3 and 4 William IV, c. 41), provides :

"It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing and consideration any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear and consider the same; and shall advise His Majesty thereon in manner aforesaid."

Section 60, Canadian Supreme Court Act, 1906, empowers the Governor-General in Council to refer important questions of law touching certain matters to the Supreme Court for hearing and consideration. The Supreme Court is bound to entertain and answer the reference, and the opinion of the Court upon such reference is subject to appeal to His Majesty in Council. The Supreme Courts of the Canadian Provinces and several of the States Supreme Courts in the United States have been invested with similar jurisdiction. The Supreme Court of the United States has consistently refused to pronounce advisory opinions upon abstract questions of law on the ground that to do so would be incompatible with the position that it occupies in the Constitution of the United States. The Permanent Court of International Justice was invested with competence to deliver advisory opinions by Art. 14 of the Covenant of the League of Nations which provided :

"The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

It has given advisory opinions on several occasions with very beneficial results. Professor Felix Frankfurter (now Frankfurter J., of the Supreme Court of the

United States) expressed himself on the subject of advisory opinions on legislative proposals 20 years ago in the following terms :

"The whole *milieu* of advisory opinions on proposed bills is inevitably different from that of litigation contesting legislation. However much provision may be made on paper for adequate arguments (and experience justifies little reliance) advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting. In the attitude of Court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated issues. Let any one, for instance, compare the adverse opinion of the Massachusetts Supreme Court upon the constitutionality of municipal coal and wood yards with the opinion of the Supreme Court sustaining such legislation; the adverse opinion of the Massachusetts Court on prohibition of trading stamps with the opinion of the Supreme Court sustaining such legislation; the adverse opinion of the Massachusetts Court on the State's power to provide for dwelling houses with the opinion of the Supreme Court sustaining such legislation. These are samples taken from the Court in which, presumably, advisory opinions have been rendered under the most favourable circumstances."

He concluded with the warning :

"It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay.¹³"

Writing in 1931, Professor Carleton Kemp Allen expressed himself as follows :

"The whole notion of 'consultation' of the judiciary is, by hypothesis, a contradiction which requires exceptional justification. The Judge does not sit in the seat of justice in order to be consulted, but in order to decide an issue. If, then, he is to be 'consulted', his advice must be one of two things. Either it is mere opinion, subject to the same limitations as any other opinion—namely, that the person advised may or may not, at his option, follow the advice; in this case it is not easy to see the advantage of imposing this additional duty on Judges Or, in the alternative, it is (like the fictitious 'advice' of the Judicial Committee) opinion of such a peculiarly authoritative nature that it is not, and is not intended to be, really opinion at all, but judgment disguised as opinion. There seems to be no cogent motive for extracting opinions from the Bench except to give them an authority which cannot belong to any lesser opinion. If, then, this opinion is really judgment, it is open to the extremely serious objection that it is anticipatory of actual facts, which are of infinite complexity, and upon which all judgment, in the sense of the application of principle to circumstances, must depend No abstract principle of interpretation laid down in advance by the Courts could be, or at all events ought to be, more than a guide for the decision of subsequent cases. It is therefore either superfluous, or else it is a signpost with a pointing finger in which we may read a gesture, not of direction, but of command or of threat.¹⁴"

13. 37 Harvard Law Review, pp. 1005—1008.

14. Vol. 47, The Law Quarterly Review, pp. 48-49.

In (1903) A. C. 524¹⁵ at p. 529, their Lordships of the Judicial Committee in an appeal from Canada declined to answer certain questions with the following observations :

"They are questions proper to be considered in concrete cases only, and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."

The desirability and utility of advisory opinions is supposed to have been stressed by Lord Loreburn in the judgment of the Judicial Committee delivered by him in (1912) A.C. 571¹ at page 581. A perusal of the judgment, however, would make it quite clear that in that case the Judicial Committee were concerned (as indeed was bound to be the case) not with the wisdom of the Canadian provision in respect of advisory opinions, but with the question whether that provision had been validly enacted by the Canadian Parliament. The very first sentence of the judgment runs:

"The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorising questions either of law or of fact to be put to the Supreme Court and requiring the Judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament."

At page 582 of the Report, Lord Loreburn thus sets out the gist of the arguments advanced on behalf of the Provinces :

"Broadly speaking the argument on behalf of the provinces proceeded upon the following lines. They said that the power to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its terms as to admit of a gross interference with the judicial character of that Court, and, therefore, of grave prejudice to the rights of the provinces and of individual citizens. Any question, whether of law or fact, it was argued, can be put to the Supreme Court, and they are required to answer it, with their reasons. Though no direct effect is to result from the answer so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions; whereby may ensue not merely distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biassed. The appellants further insist that although the Act in question provides for requiring argument, and direct-

ing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced before the Supreme Court has arrived at what will virtually be a determination of their rights."

On this he observes (p. 583) :

"This view, which was most powerfully presented, has a two-fold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the Judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada."

Viscount Haldane L. C. in (1914) A. C. 153¹⁶ at page 162 observed as follows :

"It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that Court by the Dominion Parliament. The practice is now well established, and its validity was affirmed by this Board in the recent case in (1912) A. C. 571.¹ It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all questions put to them, and have found it advisable to limit and guard their replies. It will be seen that this is so to some extent in the present appeal."

The view taken by different Lords Chancellor and Judges in the Judicial Committee

15. (1903) 1903 A. C. 524, Attorney-General for Ontario v. The Hamilton Street Railway Company.

16. (1914) 1914 A. C. 153, Attorney-General for British Columbia v. Attorney-General for Canada.

of the advisability of having recourse to provisions for obtaining advisory opinions on abstract questions of law was revealed by Lord Haldane in the House of Lords during the debate on cl. (4) of the Rating and Valuation Bill to which I have made reference earlier. He there said :

"The Dominion of Canada got into the habit many years ago, before my time, of passing Acts submitting abstract questions for the opinion of the Supreme Court of Canada, and then, by a special clause, to the Privy Council here. The Privy Council was not bound to hear those questions, and said so; but the Privy Council, from the desire to be helpful, did get into the practice of entertaining them, and the King in Council pronounces upon them when they come. I have had a long experience of these questions. I have decided scores and scores of them, and anything more unsatisfactory and more mischievous I do not know.

You get a perfectly general question brought up, without reference to specific facts — or, at least, there are no specific facts which enable you to deal exhaustively with the case; and then what happens? I have heard Lord Chancellor after Lord Chancellor say: 'We decline to answer the whole of the questions which are put to us. To do so would be to decide ahead, to go into regions which we cannot survey, and embarrass at every turn private litigants who come hereafter.'¹⁷

At a later stage he said :

"I referred on the last occasion to the liking which had grown up in Canada for submitting abstract constitutional questions to the Courts there and ultimately to the Privy Council. In my opinion experience of that course has led to enormous inconveniences, and successive Lords Chancellor have objected to and denounced it. The late Lord Herschell said some strong things about it, and at times refused to give an opinion. The late Lord Loreburn was even stronger, and other Lords Chancellor and other Judges in the Judicial Committee have expressed themselves without restraint upon a system which they deemed to be very mischievous. It was mischievous because it invited the Court to go beyond the particular case which it had to decide and to say things beyond the facts to which the decision would be applied, which might prejudice future suitors."¹⁸

On the same occasion Lord Merrivale observed :

"I want to say two or three words more with regard to the position of His Majesty's Judges in this matter. It is no part of the business of His Majesty's Judges, and never has been part of their business, at any rate since the Act of Settlement, to have any advisory concern in the acts of the Administration or to take part in advising the Administration. The natural effect of associating them with the Administration and attaching to them the responsibility for conclusions which are put forward by the Administration will be to weaken the authority of the Judiciary. It can have no other effect. . . . Why should the Judges be brought in by this side wind to help the Executive to carry on their business, to replace the Law Officers and to relieve the Executive of responsibility as to decisions that they ought to arrive at upon the law?¹⁹ ?"

Lord Carson said :

"Anything more dangerous or more unfair to the subject I cannot conceive I cannot imagine

anything worse than for us to lay down that such a procedure should be taken as one which may be applied to many other matters. Just fancy applying it to the Finance Acts—to those complicated measures which raise all the taxes of the country. A case might be submitted to the Judges as to whether under a particular clause certain persons should be taxed, and then, if they were advised that that is not the proper construction, they would be told: 'Oh, you were not there; we have got judgment; that is what the Courts say'. Anything more mischievous I cannot imagine."²⁰

Nevertheless, in 1935 Parliament thought it wise to incorporate S.213 in the Constitution Act. We must take it therefore that in the opinion of Parliament, in spite of the criticism to which provisions of this nature had been subjected, it was desirable that the Governor-General should be enabled to refer to the Court questions of law which in his opinion were of such a nature and of such public importance that it was considered expedient to obtain its opinion upon them. It is to be observed that unlike S. 4, Judicial Committee Act, 1833, and S.60, Canadian Supreme Court Act, 1906, S.213 does not make it obligatory upon the Court to arrive at a determination of the questions referred to it: (1943) 6 F.L.J. F. C. 18.²¹

The Court is to report after such hearing as it thinks fit and every report must be made in accordance with an opinion delivered in open Court with the concurrence of the majority of the Judges present with liberty to a Judge who does not concur to deliver a dissenting opinion. Thus the procedure has, as far as possible, been approximated to a judicial hearing and determination of the questions referred.

An advisory opinion on the other hand is not in the nature of a judicial pronouncement and the Constitution Act does not make an opinion appealable to His Majesty in Council. Nor is it binding upon the Governor-General. Whether the pronouncements of the Court in an advisory opinion could be regarded as "law declared by the Federal Court" within the meaning of S. 212, Constitution Act, so as to be recognised as binding on Courts in British India appears to be open to serious doubt. The very fact that the subject of advisory opinions is dealt with in a section later than S. 212 is in itself an indication that an advisory opinion would be no more than an opinion. The marginal note to S. 213 indicates that the whole procedure merely constitutes "consultation" between the Governor-General and the Court.

20. 70 H. L. Deb., 5 s., Col. 804.

21. ('43) 30 A. I. R. 1943 F. C. 13 : I. L. R. (1943) Kar. F. C. 10: 206 I. C. 533: 1943-6 F. L. J. F. C. 18 (F.C.), In re Allocation of Lands and Buildings situate in a Chief Commissioner's Province.

17. 70 H. L. Deb., 5 s. Col. 629-30.

18. 70 H. L. Deb., 5 s. Col. 765.

19. 70 H. L. Deb., 5 s., Col. 763.

Questions that may be referred to the Court for its opinion under S. 213 may fall under different categories, with reference to their nature and subject-matter and to the stage at which and the form in which they are referred. It may be that, for instance, in the case of a dispute between the Centre and a Province, questions may be referred that have reference to concrete matters in controversy between the Governments and it may be possible to proceed to their determination against that background. In a case of that description, the Court may not be faced with any difficulty having relation merely to the subject-matter or form of the reference. The Court has already answered references relating to two enactments, one passed by a Provincial Legislature and the other by the Central Legislature, which shows that where the Court is called upon to deliver an advisory opinion with reference to existing legislation, it might be able to do so, subject to such reservations and qualifications as the nature of the questions referred might necessitate. This is not, however, to be taken to mean that in all cases of completed legislation the Court would be able to deliver an opinion. That must always depend upon the nature of the questions and the material available for their determination.

In the present case we are concerned not with an existing law but with a legislative proposal. That the proposal is of a fiscal nature merely enhances the difficulty of pronouncing upon it in advance. I will not go so far as to suggest that no legislative proposal could usefully form the subject of a reference and opinion under S. 213, but I do apprehend that it would be possible for the Court to pronounce upon such a proposal with confidence only in exceptional cases. A reference relating to a legislative proposal must in a large number of cases be enveloped in a thick fog of hypotheses and uncertainties and an opinion delivered thereon could only rest upon a forest of assumptions which must rob it of all value. If a legislative proposal can be cast in a form which does not give rise to difficulties of this character the Court might find it possible to pronounce upon it. In any event the Court must be furnished with the fullest material on the subject in an exact and precise form and should not be left to base its opinion upon assumptions or be reduced to the necessity of safeguarding against misapprehension or misconstruction of what it might have to say by a profuse employment of "ifs" and "buts" and "provided". In other words, it should be put in a position to arrive at a determination of the questions referred with confidence that its opinion would furnish some guidance and help. One precaution that

might be taken would be to attach to the Reference a draft of the bill which it is proposed to place before the Legislature. I am not to be understood as suggesting that if such a draft is forwarded, the Court might always find it possible to deliver an opinion, but a draft might be found to be of considerable assistance. It is true that the bill might subsequently emerge from the Legislature in a shape very different from that in which it had been considered by the Court. In such a case the opinion of the Court will always be read with reference to the proposal placed before it and there will be no danger of its being read with reference to the form which the legislation finally takes. Such a precaution would be wise in the case of all legislative proposals, but I am disposed to regard it as indispensable in the case of fiscal proposals.

With these observations I proceed to the consideration of the reference now before us. We were informed that a reference had become necessary at this stage as the Governor-General had been advised that a law of the description envisaged in paras. (1) and (2) of the Reference was not covered by any of the entries in the three Lists of sch. 7 to the Constitution Act and that therefore this was a case in which the Governor-General would have to have recourse to his powers under S. 104 of the Act. As this was the first occasion on which such a contingency had arisen, the Governor-General had thought it prudent to seek the opinion of the Court before taking appropriate action. I fully appreciate the considerations that have prompted the Reference, but deplore my inability to answer the main questions propounded on the material made available.

The scheme of the proposed legislation is to levy upon the death of a person a duty in respect of property other than agricultural land passing upon the death. To make the duty effective and to render evasion impossible or at least difficult it is proposed to enact "that property passing upon the death" shall be deemed to include certain kinds of property which might not otherwise have been regarded as passing upon the death. It is further proposed to provide that for the purposes of this duty, the *situs* of moveable property shall be such as may be specified in the contemplated law itself or prescribed by rules made under that law. We are asked whether the Federal Legislature has power to make a law of this description, and if not is it not a matter which is not included in any of the Lists of sch. 7?

The difficulty that I have felt in dealing with these questions may be illustrated by inviting attention to para. (2) (b) of the Refer.

ence. This paragraph put by itself would read as follows :

"Assuming that the Federal Legislature has power to make a law providing for the levy of an Estate Duty, has it also the power to make a law providing that for the purposes of that duty the *situs* of moveable property shall be such as may be specified in the law or prescribed by rules made under the law ?"

The answer must depend upon the actual provision with regard to the *situs* of moveable property that may be made in the law or that may be prescribed by rules made under the law. In the absence of a draft of the provision itself, it would be impossible to say whether the Federal Legislature had or had not the power to enact such a provision. On this being pointed out, it was conceded on behalf of the Governor-General that to this part of the Reference no answer could be given and the Court was excused from attempting to frame an answer.

The main controversy revolved round para. 1 of the Reference. The contentions raised are summarised in the opinion just delivered by My Lord and my brother and need not be recapitulated here. It was maintained on behalf of the Governor-General in Council that paras. (1) and (2) (a) of the Reference indicated the real nature of the duty proposed to be levied with sufficient exactness for us to be able to pronounce an opinion upon it. I am unable to accept that position. All that para. 1 tells us is that upon the death of a person there shall be levied an estate duty in respect of property, other than agricultural land, passing upon the death. The expression "estate duty" is not a term of art and carries no precise connotation. I was unable to elicit during the course of the argument what purpose the word "estate" before "duty" in para. 1 was intended to serve, unless it was the psychologic one of directing our minds to the provisions of the English Finance Act of 1894, whereby estate duty was imposed in England. A law enacting that upon the death of a person there shall be levied a duty in respect of property passing upon the death may well be so framed as to be completely covered by entry No. 56 of the Federal List, even upon a narrow construction of the term "succession" used in that entry.

We were told that the intention was to levy a duty similar in all material respects to the estate duty imposed in England by the Finance Act of 1894 (and its later amendments) as interpreted and explained by the decisions of the English Courts thereon and we were invited to base our opinion upon that assumption. This means that we are to read into the Reference all the essential and material provisions of the English Finance Act of 1894 and all its later amendments as interpreted and

explained in the decisions of the English Courts, and further, that whoever seeks to extract any guidance or derive any profit from the opinion that the Court may be induced to deliver on that assumption must at his peril carry out a careful study of the whole of the English legislation on the subject and of the very voluminous judicial interpretation thereof. I consider this most unsatisfactory. Whenever this Court is invited to render an opinion upon questions of law, the questions must be cast in a precise and exact form and the Reference itself must contain all the material necessary to enable the Court to arrive at a satisfactory determination of the questions. It should not be left to counsel to supplement the Reference during the course of the hearing by oral submissions. Counsel may as of right enter upon an exposition and interpretation of the material contained in the Reference, but that is quite different from varying or supplementing it, which, according to their Lordships of the Judicial Committee is not permissible: (1915) A. C. 363²² at p. 369. For instance, the English Finance Act, 1894, levies a duty upon the "principal value" of all property passing upon the death of a person. There is nothing in para. (1) of the Reference which indicates that the duty contemplated in the paragraph is to bear that characteristic. We were informed that that was the intention and that we should assume that the duty would be so levied.

It was urged that paras. (1) and (2) (a) of the Reference would form the charging sections of the proposed legislation and that the nature of the proposed duty should be ascertained from the charging sections. When it was pointed out that the Reference contained no information on the method of assessment and collection of the duty we were told that the machinery provisions could have no bearing upon the nature and character of the duty. With that I am unable to agree. In determining the true nature of a tax considerable help may be derived from the machinery provisions and the schedules etc.: (1889) 14 A. C. 493⁷ at p. 507 and (1912) A. C. 212⁸ at page 223.

In (1930) A. C. 357⁹ their Lordships found no difficulty in holding that while a Canadian Act purported to impose a tax on all timber cut within the Province it proceeded in the relative schedules so to reduce the tax by rebate in the case of timber used in the Province as to leave it to operate only on timber exported and that therefore it was in effect an

22. (14) 1 A. I. R. 1914 P. C. 166 : 1915 A. C. 363 (P. C.), Attorney-General for Alberta v. Attorney-General for Canada.

export tax. In (1933) A. C. 378¹⁰ at p. 389, Lord Macmillan observed :

"It may well be that provisions dealing merely with the machinery of taxation ought not to be presumed to impose a charge, but statutes must be read as a whole and the language used in so-called machinery sections may be called in aid for the interpretation of the charging sections."

In answer to questions whether we could be given an idea of the machinery provisions proposed to be incorporated in the law levying the duty, we were informed that the matter had not yet taken any definite shape, though various alternative proposals had been under consideration. Anybody familiar with conditions in India as compared with those in England would readily appreciate that though the drafting of an Estate Duty Bill upon the model of the English Finance Act of 1894 may not present any serious difficulty so far as the so-called charging clauses are concerned, the devising of the machinery for the assessment and collection of the duty might present insurmountable difficulties. The vast bulk of the people of this country are governed in matters of inheritance and succession by their personal laws and have not the remotest conception of letters of administration, probate and the like. It may therefore well be that though the proposed duty is given the name of estate duty and is levied on "property passing upon death," yet the machinery provisions may perforce have to be so framed as to make the duty in effect a "duty in respect of succession to property" within the meaning of entry No. 56 of the Federal List. I do not think the Court could fairly be invited to make a pronouncement upon the nature of the duty proposed to be levied in the absence of full information on the subject of machinery, etc., which would be necessary to make the duty effective.

One of the considerations to which our attention was invited during the course of argument as bearing upon the question whether the expression "succession to property" in entry No. 56 of the Federal List should be given a narrow or wide construction, was that Parliament, which must be presumed to have been well aware of the technical distinction between a succession duty and an estate duty as understood in England, had made no express mention of estate duty in any of the Lists. This, it was argued, went to show that "duties in respect of succession to property" in entry No. 56 must be given a wide and liberal construction so as to cover an estate duty. It was urged that Parliament having by entry No. 55 of List 1 gone so far as to confer upon the Federal Legislature even the power to impose a capital levy it was not to be supposed that it had withheld from that Legis-

lature the power to levy an estate duty. Our attention was directed to S. 137, Constitution Act which provides that duties in respect of succession to property shall be levied and collected by the Federation but that the net proceeds thereof shall be assigned to the Provinces. It was pointed out that if estate duty was not covered by entry No. 56, List I, and was a matter not included in any of the Lists, Parliament must be deemed deliberately to have left that duty to be allotted at the discretion of the Governor-General to the Provinces or to the Centre and that it was open to the Governor-General by allotting it to the Centre in effect to deprive the Provinces of the benefit of duties in respect of succession to property and thus to defeat the purpose of S. 137. Another consequence that would follow would be that whereas even for purposes of collection duties in respect of succession to property had been divided by the Constitution Act between the Centre and the Provinces on the basis of property other than agricultural land (entry No. 56, List I) and agricultural land (entry No. 43, List II), the Governor-General would be at liberty to allot estate duty to the Centre irrespective of the character of the property upon which it might be levied. To this the answer given was that para. (1) of the Reference itself showed that it was not proposed to levy estate duty upon agricultural land and that it had already been declared that the net proceeds of the duty would be distributed among the Provinces. The rejoinder was that what was proposed to be done was a mere matter of grace and not a matter of legal compulsion and that it was not reasonable to suppose that Parliament had left these important matters to be adjusted by agreement and not by express provision. The only explanation suggested was that having regard to the conditions that prevailed in India, to which reference has been made earlier, Parliament might have felt that it would be extremely inconvenient, if not actually impossible, to levy an estate duty in this country. That again tends to emphasise the consideration already stressed that though the definition of an estate duty may be retained in the proposed law as set out in para. (1) of the Reference, the machinery provisions may have to be devised in such a fashion as to make the duty in substance one in respect of succession to property. The material supplied being insufficient to enable me to pronounce an opinion on the first question, it follows that I am unable to pronounce an opinion upon the second and subsequent questions.

I may point out that assuming that in the absence of material of the kind that I have indicated, an affirmative answer could have

been returned to the first question, as it stands, it would have been extremely difficult to return an answer to the whole of question (2) (a) in the absence of such material. It was contended on behalf of the Provinces that if the subject-matter of para. 1 was covered by entry No. 56 of List 1, the various items set out in para. (2) (a) could be regarded as merely "incidental" or "accessory" to the main purpose of the duty, designed to make the duty effective and to check evasion thereof. In the case of some of these items at least, it would not have been possible to arrive at any conclusion one way or the other in the absence of a draft of the legislative provisions embodying the items. Take, for instance, item (4) which relates to property transferred by the deceased as a gift in contemplation of death or within a specified period before death. A determination with reference to the first part of the item would depend upon the definition of a gift in contemplation of death and with reference to the second part upon the period that may be specified. In the state of the material made available to us, I do not think any useful purpose would be served by my attempting to frame answers to the questions referred. Indeed, I apprehend, that any such attempt might result in the opinion delivered being made the foundation of endless litigation hereafter, apart altogether from any question relating to the *vires* of the proposed law, and operating to the serious prejudice of persons whom it might be attempted to bring within the mischief of that law. It is bound to raise ghosts far more troublesome than any that it might serve to lay. For these reasons I am compelled respectfully to decline to express any opinion on the questions referred.

R.K.

*Reference answered.***A. I. R. (31) 1944 Federal Court 86***(From Patna)*

23rd May 1944

SPENS C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*Basanta Chandra Ghose and others*
Appellants

v.

Emperor.

Criminal Appeals Nos. 3, 4, 5 and 6 of 1944.

(a) Restriction and Detention Ordinance (3 of 1944) — Power of Governor-General to promulgate Ordinances— Source and extent of— Ordinance is not ultra vires the Governor-General.

The positive provision enabling the Governor-General to promulgate Ordinances is not that contained in Ss. 99 and 100, Constitution Act, but that contained in the earlier portion of S. 72 in Sch. 9 itself, and the words "for the peace and good government of British India" there found have always been

held to be words of the widest amplitude. It is true that in the earlier Government of India Acts this provision was not controlled or restricted by anything like the allocation of certain subjects exclusively to Provincial Legislatures; but so far as the scope of the expression is concerned, it must still continue to have the same wide meaning as before. The latter part of the section no doubt imports a limitation by reference to the powers of the Indian Legislature. So far as that limitation involves a restriction of the wide scope of the earlier words, the extent of the restriction must be ascertained not merely in the light of S. 100 but also of S. 102 of the Act of 1935. By reason of a proclamation of emergency under S. 102, Government of India Act, the Indian Legislature is now competent to legislate both upon central and provincial subjects. There is accordingly no justification for limiting the ordinance-making power of the Governor-General to List 1 and List 3 subjects of the Government of India Act. That power extends to List 2 subjects of the Government of India Act and therefore the Governor-General was entitled to promulgate Ordinance 3 of 1944 bearing upon "preventive detention for reasons connected with the maintenance of public order" a provincial subject mentioned in List 2, Entry 1, Government of India Act. [P 89 C 2]

(b) Restriction and Detention Ordinance (3 of 1944), Preamble and Ss. 10 and 6 — Preamble of Ordinance need not set out in detail nature of emergency leading to its promulgation and refer therein to all its provisions.

It is not necessary that an Ordinance promulgated by the Governor-General should set out in detail the nature of the emergency that has led to its promulgation referring therein to all the provisions of the proposed Ordinance. Once the Governor-General is of the opinion that an emergency calling for action under S. 72, Sch. 9, Government of India Act, has arisen, the nature of the provisions required to meet that emergency is left to be decided by the Governor-General. The recital however in the preamble of Ordinance 3 of 1944 as to the necessity "to confirm the validity of the past exercise of such powers under R. 26, Defence of India Rules" has relation both to S. 10 and S. 6, Restriction and Detention Ordinance. [P 90 C 1]

(c) Restriction and Detention Ordinance (3 of 1944), S. 10—S. 10 does not repeal S. 491, Criminal P. C. — It only interdicts High Court from exercising power conferred by S. 491, Criminal P. C., in certain cases — This Ordinance-making authority was competent to do.

Section 10 does not purport to repeal S. 491, Criminal P. C. It would be too much to maintain that no Ordinance could contain any provision inconsistent with a provision contained in any Act of the Legislature. Section 491, Criminal P. C., confers a certain power or jurisdiction on the High Court, and all that S. 10 of the Ordinance does is to interdict the High Court from exercising that power or jurisdiction in a certain class of cases, and this was permissible for the ordinance-making authority to do. [P 90 C 1]

(d) Restriction and Detention Ordinance (3 of 1944), Ss. 6 and 10 — Provision in, that order of detention shall not be questioned in any Court is valid.

Whatever may be said as to the provision in S. 6 (1) about the 'validity' of the order of detention, so much of that section and of cl. (1) of S. 10 as enacts that the order of detention shall not be called in question in any Court is valid : ('43) 30 A.I.R. 1943 F. C. 75, *Rel. on.* [P 90 C 2]

(e) Restriction and Detention Ordinance (3 of 1944), Ss. 6 (2) and 10 — Words “every such order” in S. 6 (2)—Scope of—Expression “order having effect by virtue of S. 6, etc.” in S. 10 — Ambit of — Nature and extent of curtailment of High Court’s power by S. 10 to interfere with orders of detention indicated.

The word “such” ordinarily attracts only whatever is expressed as qualifying or descriptive of the same subject in the preceding sentence. So viewed, the expression “every such order” in S. 6 (2) can only refer to the words “made before the commencement of this Ordinance under R. 26, Defence of India Rules,” because they alone qualify or are descriptive of the order dealt with in cl. (1) of S. 6. The succeeding words in cl. (1) of S. 6 are enacting words and not descriptive words. They refer to a possible ground of invalidity and enact that such ground of invalidity shall not furnish a basis for relief. As a matter of grammatical construction, those words cannot be imported in cl. (2) of S. 6. The expression “every such order” in S. 6 (2) therefore refers to all orders made before the commencement of the Ordinance under R. 26, Defence of India Rules and not merely to those which were invalid by reason of the ultra vires character of Rule 26, Defence of India Rules. This scope of S. 6 (2) also determines the ambit of the expression “order having effect by virtue of S. 6, etc.” in S. 10 : Cr. Appln. No. 585 of 1943 (Bom.) (F.B.), *Expl.* [P 92 C 2 ; P 93 C 1]

But it does not follow from this that the Court can no longer consider the validity of an order which on the face of it appears or purports to have been passed under R. 26, Defence of India Rules. No further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance 3 of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under R. 26 and now deemed to be made under Ordinance 3 of 1944 or a new order purporting to be made under Ordinance 3 of 1944 was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that R. 26 was ultra vires, S. 10 of Ordinance 3 of 1944 will no more prevent it from so finding than S. 16, Defence of India Act did. Such an invalid order, though purporting to be an order, will not in fact be an “order made under the Ordinance” or having effect by virtue of S. 6 as if made under the Ordinance at all for the purposes of S. 10. It is therefore not correct to say that the Ordinance has taken away the power of the High Court to pass any orders under S. 491, Criminal P. C., and that the proceedings must be treated as discharged under the provisions of S. 10 (2) of the Ordinance. [P 93 C 2 ; P 94 C 1]

(f) Restriction and Detention Ordinance (3 of 1944), S. 10 (2) and (1)—Direction in S. 10 (2) is not legislative but judicial act—S. 10 (2) is void to extent to which it goes further than S. 10 (1).

The distinction between a ‘legislative’ act and a ‘judicial’ act is well-known, though in particular instances it might not be easy to say whether an act should be held to fall in one category or in the other. The Legislature is only authorised to enact laws. Some of the pending proceedings hit at by S. 10 (2) may raise questions of fact and their determination may wholly depend upon questions of fact and not upon any rule of law, as for instance, when it is alleged that an order of detention was not really the act of the authority by whom it purports to have

been made or that it was a mala fide order or one made by a person who had not been authorised to make it. A direction that such a proceeding is discharged is clearly a judicial act and not the enactment of law. It is a direct disposal of cases by the Legislature itself. Accordingly S. 10 (2) is void to the extent to which it goes further than S. 10 (1) : *Case law discussed.* [P 90 C 2 ; P 91 C 1]

M. N. Pal and B. C. De (with S. R. Ghosal), Advocates, Patna High Court, instructed by Gurudayal Sahay, Agent (in 3 and 5); Raghbir Singh, Advocate Federal Court, instructed by Gurudayal Sahay, Agent (in 4); and Raghbir Singh, Advocate Federal Court, (M. N. Pal with him) instructed by R. C. Prasad, Agent (in 6) — for Appellants.

Mahabir Prasad, Advocate-General of Bihar (with R. J. Bahadur) instructed by S. P. Varma, Agent (in all) — for the Crown.

Sir Brojendra Mitter, Advocate-General of India (with H. K. Bose, Advocate, Federal Court) instructed by K. Y. Bhandarkar, Agent — Appeared in response to notice issued to him under O. 36, R. 1, Federal Court Rules, 1942.

Spens C. J.—These are appeals by certain detenus against orders passed by the High Court at Patna dismissing applications filed by them or on their behalf for their release under S. 491, Criminal P. C. Two of the petitions, from which Criminal Appeals Nos. 3 and 5 arise, were dealt with by one Division Bench, in a judgment which has discussed the contentions urged in support of the petitions. The petitions in the other two cases were disposed of by two other Benches which have followed that judgment. On behalf of the Crown it was urged before the High Court that Ordinance 3 of 1944—which had been promulgated during the pendency of some of these petitions—had taken away the power of the Court to pass any order under S. 491, Criminal P. C., in these cases. By way of reply to that argument, the validity of the Ordinance was impugned on behalf of the detenus; certain contentions as to the construction and effect of the Ordinance were also advanced. The High Court upheld the objection raised on behalf of the Crown but granted a certificate under S. 205, Constitution Act. In the main judgment under appeal, the learned Judges rejected the limited interpretation which counsel for the detenus sought to place on Ss. 6 (2) and 10 of the Ordinance. They also held that there was nothing to suggest that the Governor of Bihar had not duly passed the orders for detention. Before this Court, the objection based on the Ordinance has been relied on by the Advocate-General of Bihar and counsel for the appellants have urged several contentions both in respect of the validity of the Ordinance and in respect of its meaning and effect. It will facilitate the appreciation as well as the discussion of these arguments to begin with a brief narration of

the circumstances that led to the promulgation of the Ordinance.

Immediately after the outbreak of the war, provision was made by an Ordinance (Ordinance 5 of 1939) promulgated by the Governor-General and by rules framed thereunder for the administration taking all necessary measures to ensure the public safety and interest and the defence of British India. On 29th September 1939, an Act (Defence of India Act 35 of 1939) was passed by the Legislature itself, making necessary provision in this behalf and the Ordinance was repealed. Section 2 of this Act enabled the Central Government to make rules for securing 'the defence of British India, the public safety, the maintenance of public order' etc. Clause 2 of this section contained some further provisions relating to the rules to be so made. One of the rules framed by the Central Government was R. 26, Defence of India Rules, enabling certain authorities to make orders for detention, if they were satisfied with respect to any particular person that it was necessary to make such an order with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, etc.

In (1943) 6 F. L. J. 28¹ this Court held that R. 26, Defence of India Rules, went further than the rule-making powers conferred by S. 2 of the Act, warranted. As it would have followed from this decision that persons detained at the time under orders passed on the basis of R. 26 must be released, the Governor-General promulgated Ordinance 14 of 1943 whose material provisions were :

"S. 2. For cl. (x) of sub-s. (2) of S. 2, Defence of India Act, 1939 (35 of 1939) the following clause shall be substituted, and shall be deemed always to have been substituted, namely : (x) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything."

"S. 3. For the removal of doubts it is hereby enacted that no order heretofore made against any per-

son under R. 26, Defence of India Rules, shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under S. 2, Defence of India Act, 1939."

The validity and effect of Ordinance 14 of 1943 had to be considered by this Court in 1944 F. C. R. 1.² The Court then indicated certain doubts as to the validity of S. 2 of the Ordinance, as it attempted to change the statute law with retrospective effect, but it upheld the validity of S. 3, with the result that detention orders theretofore passed could no longer be impugned on the ground that R. 26 was not warranted by S. 2, Defence of India Act. The judgment of this Court in 1944 F. C. R. 1² dealt with two other objections raised against the validity of the orders of detention then under consideration and the objections were upheld, in some instances unanimously and in other cases by a majority. One related to the authority who was to be satisfied as to the necessity for the detention, viz., whether in the provinces it must be the Governor himself or it may be any person to whom certain classes of work may be assigned under S. 59, Constitution Act, the other related to the nature and extent of the presumption to be made in favour of the 'validity and regularity' of orders for detention that had been passed under the invalid R. 26. The position taken up on behalf of the Crown in that case and in other cases before the provincial High Courts was that it was not necessary that the order should be the result of consideration in each case by the Governor and that every presumption must be made in favour of its validity and regularity.

This Court pronounced judgment in 1944 F. C. R. 1² on 31st August 1943; and Ordinance 3 of 1944 was promulgated on 15th January 1944. Roughly the purpose of the Ordinance may be described as three-fold : (i) to confer the power of detention, etc., by the Ordinance itself instead of by rules framed under the Defence of India Act see Ss. 4 and 5 of the Ordinance ; (ii) to limit the term of detention in the first instance, to provide for the review (by certain authorities) of the order of detention from time to time and to give opportunity to the detenu to make representation to the executive authorities against the order *vide* Ss. 7, 8 and 9 ; and (iii) to enact a presumption in the Ordinance itself in favour of detention orders to preclude their being questioned in Courts of law and to take away or limit the power of the High Court to

1. ('43) 30 A.I.R. 1943 F. C. 1 : I. L. R. (1943) Kar. F. C. 26 : 207 I. C. 1 : (1943) 6 F.L.J. 28 : I.L.R. (1944) Bom. 183 (F. C.), Keshav Talpade v. Emperor.

2. ('43) 30 A. I. R. 1943 F. C. 75 : I. L. R. (1943) Kar. F. C. 103 : 211 I. C. 241 : 1944 F. C. R. 1, Emperor v. Sibnath Banerjee.

make orders under S. 491, Criminal P. C., in such cases . . . : *vide* ss. 6 and 10.

As the third set of provisions are those calling for consideration in these cases, it will be convenient to set them out here, so far as they are material :

"6. (1) No order made before the commencement of this Ordinance under R. 26, Defence of India Rules, shall after such commencement be deemed to be invalid or be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said order was made be legally conferred by a rule made under S. 2, Defence of India Ordinance, 1939 (5 of 1939) or under S. 2, Defence of India Act, 1939 (35 of 1939).

(2) Every such order shall on the commencement of this Ordinance be deemed to have been, and shall have effect as if it had been, made under this Ordinance, and as if this Ordinance had been in force at the time the order was made :

Provided that S. 7 and S. 9 of this Ordinance shall apply in relation to any order made under cl. (b) of sub-r. (1) of R. 26, Defence of India Rules, as if that order had been made on the date of the commencement of this Ordinance, and S. 8 of this Ordinance shall not apply to any such order."

"10. (1) No order made under this Ordinance, and no order having effect by virtue of S. 6 as if it had been made under this Ordinance, shall be called in question in any Court, and no Court shall have power to make any order under S. 491, Criminal P. C., (5 of 1898) in respect of any order made under or having effect under this Ordinance or in respect of any person the subject of such an order.

(2) If at the commencement of this Ordinance there is pending in any Court any proceeding by which the validity of an order having effect by virtue of S. 6 as if it had been made under this Ordinance is called in question, that proceeding is hereby discharged.

(3) Where an order purports to have been made by any authority in exercise of any power conferred by or under this Ordinance, the Court shall, within the meaning of the Indian Evidence Act, 1872 (I of 1872), presume that such order was so made by that authority."

It will be noticed that cl. (1) of S. 6 substantially corresponds to S. 3 of Ordinance 14 of 1943 but S. 10 goes farther. Clause (1) of S. 10 purports to deal with two classes of orders—(a) orders made under this Ordinance and (b) orders having effect by virtue of S. 6 as if they had been made under this Ordinance. We are not concerned in this case with any order of the (a) category but only with orders falling under category (b). Clause (2) of S. 10 is limited to orders under category (b). The words 'having effect by virtue of S. 6 as if it had been made under this Ordinance, refer us back to cl. (2) of S. 6 which opens with the words 'every such order'. Lengthy arguments have been advanced before this Court as to the connotation of these words.

The validity of the Ordinance and its relevant provisions was questioned on several grounds. A broad contention was put forward that under S. 72, sch. 9, Constitution Act, the Governor-General was not entitled

to promulgate an Ordinance bearing upon "preventive detention for reasons connected with the maintenance of public order" because that is exclusively a provincial subject (List II, entry 1). This contention was founded on the concluding words of S. 72 which subject the ordinance-making power "to the like restrictions as the power of the Indian Legislature to make laws". It was urged that, as the Indian Legislature was not normally entitled to legislate on List II subjects, the fact that by reason of a proclamation of emergency under S. 102, Constitution Act, the powers of the Indian Legislature had for the time being been enlarged so as to embrace provincial subjects as well, would not widen the scope of the ordinance-making power. We are unable to accept this contention. The positive provision enabling the Governor-General to promulgate Ordinances is not that contained in ss. 99 and 100, Constitution Act, but that contained in the earlier portion of S. 72 itself, and the words "for the peace and good government of British India" there found have always been held to be words of the widest amplitude. It is true that in the earlier Government of India Acts this provision was not controlled or restricted by anything like the allocation of certain subjects exclusively to Provincial Legislatures; but so far as the scope of the expression is concerned, it must in our judgment still continue to have the same wide meaning as before. The latter part of the section no doubt imports a limitation by reference to the powers of the Indian Legislature. So far as that limitation involves a restriction of the wide scope of the earlier words, the extent of the restriction must be ascertained not merely in the light of S. 100 but also of S. 102 of the Act of 1935. It has not been disputed that the Indian Legislature is to-day competent to legislate both upon central subjects and upon provincial subjects. We see no justification for limiting the ordinance-making power even in such circumstances to List I and List III subjects. Another possible answer to the contention is that during war conditions even 'maintenance of public order' may reasonably be held to be included in the expression "preventive detention in British India for reasons of State connected with Defence", entry 1 of List I, but it is unnecessary to base our decision on that ground.

It was next urged that the provisions of S. 10 of the Ordinance were beyond the Ordinance-making power, because (a) the emergency described in the opening paragraph of the Ordinance did not postulate the necessity for such a provision and (b) an Ordinance could not repeal S. 491, Criminal P. C., as it

was suggested S. 10 in effect does. We are of the opinion that there is no substance in these contentions either. It is not necessary that an Ordinance should set out in detail the nature of the emergency that has led to its promulgation, referring therein to all the provisions of the proposed Ordinance. Once the Governor-General is of the opinion that an emergency calling for action under S. 72 has arisen, the nature of the provisions required to meet that emergency is left to be decided by the Governor-General. We may, however, point out that in this case, the preamble refers to the necessity "to confirm the validity of the past exercise of such powers under R. 26, Defence of India Rules." This recital has relation both to S. 10 and to S. 6 of the Ordinance.

The argument as to the power of the ordinance-making authority to repeal a provision of an independent legislative measure does not call for determination in this case, because S. 10 does not purport to repeal S. 491, Criminal P. C. It would be too much to maintain that no Ordinance could contain any provision inconsistent with a provision contained in any Act of the Legislature. Section 491, Criminal P. C., confers a certain power or jurisdiction on the High Court, and all that S. 10 of the Ordinance does is to interdict the High Court from exercising that power or jurisdiction in a certain class of cases. It was then said that so viewed the Ordinance interfered with the jurisdiction of the High Court and this was not permissible because of S. 223, Constitution Act. It was insisted that the ordinance-making authority could not be regarded as "the appropriate Legislature to whom alone the power to affect the jurisdiction and powers of the High Court has been given by that section. There are two answers to this argument. Section 311 (6), Constitution Act, provides that any reference in the Act to Federal Acts, etc. . . . shall be construed as including a reference to an Ordinance made by the Governor-General, etc. . . . If this description could include an Ordinance made by the Governor-General under S. 72 of Sch. 9, such an Ordinance would also fall within the description "Act of the appropriate Legislature" in S. 223. Should it however be assumed that S. 311 (6) only referred to Ordinances passed under Ss. 42, 43, 88 and 89 of the Act of 1935, the result would only be that under S. 223 the High Court would continue to have the same jurisdiction and powers "as immediately before the commencement of Part III of this Act." At that time, the jurisdiction and powers of the High Courts were expressly subject to the Governor-General's ordinance-making power under

S. 72 by reason of a clause to that effect in the Letters Patent.

It was next contended that Ss. 6 and 10 of Ordinance 3 were retrospective in their operation and that it was beyond the competence of the Governor-General to enact a retrospective Ordinance. This question is concluded by the decision of this Court in 1944 F.C.R. 1.² Whatever may be said as to the provision in cl. (1) of S. 6 about the 'validity' of the order of detention, so much of that section and of cl. (1) of S. 10 as enacts that the order of detention shall not be called in question in any Court is valid according to that decision.

Clause (2) of S. 10 of the Ordinance was objected to on a different ground. It was said that this was an arrogation of judicial power by a legislating authority. It was argued that a legislating authority might be competent to enact a law even in such manner as to prejudice the rights of parties to a pending litigation, and a Court might be obliged to dismiss a proceeding as a result of the application of the law as changed. But, goes the argument, all that the legislating authority does in such a case is only to pass a law; and the disposal of the particular case still remains the function of the Court. In the present case, however, cl. (2) of S. 10 does not enact a rule of law and leave it to the Court to apply it to the decision of cases pending before it; the section straightway discharges all pending proceedings. This objection was sought to be met, on behalf of the Crown, in two ways. The Advocate-General of India argued that—whatever may be said of the language employed—cl. (2) did not go and was not intended to go further than what cl. (1) provided. If that were so, the scope and effect of cl. (2) must depend upon the construction that we place on cl. (1). The Advocate-General of Bihar maintained that cl. (2) was valid and within the competence of the ordinance-making authority to the full extent which its language signified, even if it went further than cl. (1) of that section. With this argument we are unable to agree.

The distinction between a 'legislative' act and a 'judicial' act is well known, though in particular instances it might not be easy to say whether an act should be held to fall in one category or in the other. The Legislature is only authorised to enact laws. Some of the pending proceedings hit at by cl. (2) of S. 10 may raise questions of fact and their determination may wholly depend upon questions of fact and not upon any rule of law, as for instance, when it is alleged that an order of detention was not really the act of the authority by whom it purports to have been made or that it was a mala fide order or one made

by a person who had not been authorised to make it. A direction that such a proceeding is discharged is clearly a judicial act and not the enactment of a law. This question was discussed at some length in the judgment of this Court in 1944 F. C. R. 61.³ The nature of the provision then considered was essentially different from cl. (2) of S. 10 of the present Ordinance. As explained in that judgment, the position there was that certain cases had in fact been tried by Tribunals constituted under an earlier Ordinance and decisions had been pronounced by those Tribunals, but the jurisdiction of those Tribunals was negatived by a decision of this Court. The later Ordinance provided that those decisions should be treated as decisions of duly constituted Tribunals. Applying the test laid down in (1926) 38 Com. L. R. 153⁴ this Court held that that did not constitute an exercise of judicial power by the ordinance-making authority. But here there has been no investigation or decision by any Tribunal which the legislating authority can be deemed to have given effect to. It is a direct disposal of cases by the Legislature itself.

The learned Judges of the Patna High Court overruled this objection on the authority of a decision of the Supreme Court of the United States (3 Dallas. 386⁵). We were informed by counsel that the report of the case was not available at Patna and they thought that the learned Judges probably relied on the reference made to it in (1870) 6 Q. B. 1.⁶ That perhaps explains how the learned Judges happened to treat that decision as an authority against the appellants' contention; it is, if anything, an authority in their favour. The Supreme Court was there called upon to consider the validity of a "resolution" passed by the Legislature of Connecticut in 1795, whereby a decree of a Court of Probate was set aside and a new hearing was directed. The Court recognised that this was a judicial act and not a legislative act; but nevertheless they upheld the resolution because according to the then Constitution of Connecticut, the body which passed that resolution had judicial powers also and was competent to grant a new trial. The learned Judges added that they dealt with the question of the validity of *ex post facto* "legislation" only because counsel for the appellant thought it would be advantageous to his client to ask the Court

to deal with the case on the footing that the resolution was a legislative act; they held against him even on that assumption. This decision has been referred to in (1870) 6 Q. B. 1⁶ only in connexion with the doctrine of *ex post facto* legislation and not in any discussion of the difference between a judicial act and a legislative act. The Order-in-Council considered by the Judicial Committee in (1932) A. C. 260⁷ contained a provision in the following terms:

"If any such action or legal proceeding has been or shall be instituted, it shall be dismissed and made void, subject to such order as to costs as the Court may think fit to make."

It will be noticed that this left it to the Court to dismiss the proceeding and left intact the power of the Court to make orders as to costs. The direction to dismiss must be understood in the light of an earlier provision in the same Order-in-Council which amended the law on which the proceeding was founded; the dismissal was thus the result of the change in the law and all that the later clause showed was that that change was to have retrospective effect and govern the rights of parties even in pending proceedings. The decision would be helpful to the Crown here only if and in so far as the provision in cl. (2) had followed from a change in any rule of law. It must also be remembered that the Judicial Committee was not dealing with an act of a non-sovereign authority. The order had been enacted by His Majesty-in-Council and the Committee, after a discussion of the constitutional position in Ceylon, held that it was made "by virtue of the legislative authority he had reserved to himself" as sovereign, when passing the very order on which the plaintiffs' proceeding was founded.

The Advocate-General of India brought to our notice a section in the Indemnity Act, 1919 (Act 27 of 1919), passed by the Indian Legislature, which winds up with the words 'and if any such proceeding has been instituted before the passing of this Act, it is hereby discharged.' Two observations have to be made in relation to this enactment. For one thing, this concluding provision seems only to follow as the result of the indemnity enacted by the preceding clause. It is thus consistent with the position now contended for by the Advocate-General of India; but it will not afford any support to the contention of the Advocate-General of Bihar. In any event, this provision has not been judicially discussed and the mere fact of such a provision having been enacted in that form once before will not give it a validity which it will not otherwise possess. We think it right to add that cl. (2) of S. 10 of the present Ordinance

3. ('44) 31 A.I.R. 1944 F.C. 1 : 23 Pat. 159; I.L.R. 1944 Kar. F. C. 8 : I. L. R. (1944) Nag. 300 : 211 I. C. 556; 1944 F. C. R. 61 (F.C.), *Piare Dusadh v. Emperor*.

4. (1926) 38 Com. L. R. 153, *Federal Commissioner of Taxation v. Munro*.

5. 3 Dallas 386, *Calder v. Bull*.

6. (1870) 6 Q. B. 1, *Philips v. Eyre*.

7. (1932) 1932 A. C. 260, *Abeysekara v. Jayatilaka*.

bears no analogy to enactments indemnifying public officers. Its effect is to continue the deprivation of a subject's liberty and at the same time to deny him the opportunity of showing that his detention is not warranted by any statute or statutory rule. We are of the opinion that the appeals before us must be dealt with on the footing either that cl. (2) of S. 10 of the Ordinance has no wider operation than cl. (1) or that cl. (2) is void and inoperative. Our decision must accordingly turn on the construction and effect of cl. (1) of S. 10.

Turning now to the question of the interpretation of the relevant provisions of the Ordinance, the first point for determination is : What are the orders included in the expression 'every such order' in cl. (2) of S. 6. The operation of cl. (1) of S. 10, in so far as it relates to the orders classified as category (b) above, will be limited to the orders falling under cl. (2) of S. 6. The same will govern even cl. (2) of S. 10, if that provision is to be given effect to. On behalf of the detenus, it has been contended that the word 'such' attracts not merely the qualification to be found in the opening words of cl. (1) of S. 6, namely, 'order made before the commencement of this Ordinance under R. 26, Defence of India Rules' but a further qualification to be extracted from the reference there contained to the ground of invalidity arising out of the ultra vires character of R. 26. On this footing, it was argued that all that S. 10 debars is objection or relief based merely on the ground that R. 26, Defence of India Rules, was ultra vires and that the power of the Court to grant relief on other grounds has not been taken away. The Patna High Court (in the judgment under appeal) and the Calcutta High Court (in Misc. Case No. 236 of 1943⁸) have not been prepared to adopt this limited construction. The contention is referred to in the judgment of the Lahore High Court in (1944) 7 F. L. J. 149,⁹ but it was apparently not found necessary in that case to decide the point. It was suggested on behalf of the appellants that the judgment of the Full Bench of the Bombay High Court (in Cri. Appln. No. 585 of 1943) supports them. A careful perusal of the judgment does not convince us that so far as cl. (2) of S. 6 is concerned, the learned Judges have adopted the construction now contended for by the appellants. In one place they observe 'that it is only orders made valid by S. 6 (1) to which S. 6 (2) applies and is limited.' This language

may in fact cover all orders passed before the commencement of this Ordinance because they had all been passed under R. 26, Defence of India Rules, and they were all tainted with the illegality attaching to that rule, at any rate all the orders passed before Ordinance 14 of 1943. In another part of the judgment, they say 'only orders valid except for the defect mentioned in sub-s. (1) were covered by sub-s. (2).' This is different from saying that sub-s. (2) is limited to orders which are liable to challenge only on the ground of the invalidity of R. 26. The learned Judges were emphasising the difference between orders which substantially complied with R. 26 and orders which only purported to be made under R. 26 but did not in substance comply with its requirements. We shall return to this question when we consider the effect of S. 10.

So far as S. 6 (2) is concerned, we are of the opinion that the limited construction put forward on behalf of the appellants is not its proper or natural meaning. To begin with, that construction is not in accordance with the ordinary connotation of the word 'such.' The word ordinarily attracts only whatever is expressed as qualifying or descriptive of the same subject in the preceding sentence. So viewed, it can only refer to the words "made before the commencement of this Ordinance under R. 26 of the Defence of India Rules," because they alone qualify or are descriptive of the order dealt with in cl. (1) of S. 6. The succeeding words in cl. (1) are enacting words and not descriptive words. They refer to a possible ground of invalidity and enact that such ground of invalidity shall not furnish a basis for relief. We are unable to hold that as a matter of grammatical construction those words can be imported into cl. (2). Further, it seems to us that the construction contended for will not be consistent with the scheme of the Ordinance. As explained already, the Ordinance was promulgated with a view to get over difficulties arising out of the statutory rules on which the power of detention had depended. The authorities preferred to base it on an independent enactment and accordingly promulgated the Ordinance. Normally, only orders passed subsequent to the promulgation of the Ordinance could be supported by the new power. To avoid a situation under which existing orders would be subject to the old Act and rules and only new orders subject to the new Ordinance, it was thought necessary to enact that even orders that had been passed under the old statutory rules should be deemed to have been and should have effect as if they had been made under the Ordinance. This explains the dichotomy assumed in S. 10,

8. Misc. Case No. 236 of 1943 (on High Court file), *Jatindra Gupta v. Emperor*.

9. (1944) 31 A. I. R. 1944 Lah. 142 : 213 I. C. 327 : (1944) 7 F. L. J. 149 (F. B.), *Baldev Mitter v. Emperor*.

namely, of orders made under the Ordinance and orders having effect as if they had been made under the Ordinance. It is scarcely consistent with this scheme to assume that cl. (2) of S. 6 comprised only some of the orders that had been passed under Rule 26, Defence of India Rules, and that other orders passed under that rule were left to stand in a category of their own and continue to be governed by the old rules themselves. It was also a further part of the scheme of the Ordinance that after its date, orders of detention should ordinarily be in force only for six months unless continued on further consideration for another period. Section 9 which gives effect to this intention adopts the same dichotomy as S. 10, classifying the orders into (i) orders made under this Ordinance and (ii) orders deemed under the provisions of S. 6 to have been so made. If some of the orders made under R. 26, Defence of India Rules, should be held not to be comprised in cl. (2) of S. 6 the persons detained under those orders would not be entitled to the benefit of S. 9, a result which does not seem to be consistent with the scheme and purpose of the Ordinance. Lastly, if cl. (1) of S. 10, in so far as it relates to orders passed before the date of the Ordinance, were to be limited to orders open to objection only on the ground of the invalidity of R. 26, Defence of India Rules, the provision would seem to be redundant because that matter has been specifically provided for in cl. (1) of S. 6. *Per contra*, it has been suggested that if cls. (1) and (2) of S. 10 were applicable to all orders of detention on whatever ground they might be impeached, cl. (1) of S. 6 would have been unnecessary because the objection to the validity of R. 26 would also be one of the objections precluded by S. 10. It is difficult to deny the force of this contention. It is, however, possible that as the corresponding provision in Ordinance 14 of 1943 had already been the subject of a decision of this Court, the authorities deemed it safer to reproduce it as cl. (1) of S. 6 of the new Ordinance in addition to the general language of S. 10 which had still to run the gauntlet of a challenge in a Court of law. Clause (1) of S. 6 also goes somewhat further than S. 10 in that it not merely affects the remedy but also enacts that the orders there referred to shall not be deemed to be invalid. A declaration to that effect was apparently not thought right to make except in a limited class of cases.

The view stated above as to the scope of cl. (2) of S. 6 will also determine the ambit of the expression 'order having effect by virtue of S. 6, etc.' in S. 10 of the Ordinance. But it does not follow from this that the Court can no longer consider the validity of an order

which on the face of it appears or purports to have been passed under R. 26. It is on this aspect of the case that the judgment of the Bombay Full Bench is of assistance. We respectfully agree with the learned Judges that the Ordinance does not protect a document which is not really an 'order under R. 26' though it may appear on its face to be the order of an authorised officer. Clauses (1) and (3) of S. 10 of the Ordinance have not introduced any new principle of immunity. Except for the reference to S. 491, Criminal P. C., they only re-enact cls. (1) and (2) of S. 16, Defence of India Act, and they had to be so re-enacted because all future orders of detention would be made under the Ordinance itself and could not therefore attract the benefit of S. 16, Defence of India Act. The verbal change effected by the omission of the words 'and signed' found in S. 16 (2) of the Act is explained by the inappropriateness of that requirement in the case of orders purporting to be passed by a 'Governor' because under S. 59, Constitution Act, such an order is not 'signed' by the Governor. It is material to note that while cl. (3) of S. 10 of the Ordinance enacts a presumption in favour of any order purporting to have been made by any authority, etc., cl. (1) of S. 10 and cl. (1) of S. 6 which is imported into cl. (2) of S. 6 refer only to an order made and do not include orders 'purporting to be made'. The same distinction was made in cls. (1) and (2) of S. 16, Defence of India Act (35 of 1939). The circumstance that even in the new Ordinance the presumption is laid down in cl. (3) of S. 10 only as a rebuttable presumption is significant. Such a presumption can be rebutted; but it would be meaningless to allow it to be rebutted if, by reason of cl. (1) of the same section, the party is not to get any relief even after rebutting the presumption. The addition in cl. (1) of S. 10 of the words which preclude the exercise of the power under S. 491, Criminal P. C., involves no change in the legal position. That part of the clause is only consequential upon and must be held to be co-extensive in operation with the preceding part of the clause. Its scope is also limited by the repetition of the words 'any order having effect under this Ordinance'.

In our judgment, no further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance 3 of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under R. 26 and now deemed to be made under Ordinance 3 or a new order purporting to be made under Ordinance 3 was in fact validly made, in exactly the same way

as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that R. 26 was ultra vires, S. 10 of Ordinance 3 will no more prevent it from so finding than S. 16, Defence of India Act, did. Such an invalid order, though purporting to be an order, will not in fact be an "order made under this Ordinance" or having effect by virtue of S. 6 as if made under this Ordinance at all for the purposes of S. 10.

We are accordingly of the opinion that the learned Judges who pronounced the main judgment (in Criminal Misc. Cases Nos. 60/43 and 204/43)* erred in holding that the new Ordinance has taken away the power of the High Court to pass any orders under S. 491, Criminal P. C., and that the proceedings must be treated as discharged under the provisions of S. 10 (2) of the Ordinance. The judgments in the other two cases purport to follow this judgment. There are observations in some of the judgments bearing upon what may be called the merits of the case. But it is difficult to say that the treatment of that aspect of the case is not likely to have been affected by the view which the learned Judges took as to the deprivation by the Ordinance of the power of the Court to pass any order under S. 491, Criminal P. C. It seems to us that in these circumstances the only proper course is to allow all the four appeals and to set aside the orders of dismissal passed by the High Court in all these cases. The cases will be remitted to the High Court with a direction that the petitions be restored to the file and disposed of in due course of law in the light of the decision above given as to the nature and extent of the Court's power in the matter.

G.N.

Appeals allowed.

* See A. I. R. 1945 Patna : 23 Pat. 475.

A. I. R. (31) 1944 Federal Court 94*(From Peshawar)*

24th March 1942

GWYER C. J., VARADACHARIAR AND
ZAFRULLA KHAN JJ.*The North-West Frontier Province —
Applicant*

v.

Suraj Narain Anand — Opposite Party.

Case No. 2 of 1942: Application for leave to appeal to His Majesty in Council from decision of Federal Court, Reported in ('42) 29 A. I. R. 1942 F. C. 3.

Government of India Act (1935), S. 208 (b)—
Leave to appeal under, when may be given.

The fact that the party (Government) adversely affected by the decision of the Federal Court thinks that the decision of the Federal Court was wrong, is not itself a reason for granting to that party leave to appeal to His Majesty in Council under S. 208 (b). The case may be different if any fundamental principle of far-reaching importance is involved in the Federal Court's decision, or if great administrative inconvenience was likely to arise from it. [P 94 C 2]

Sardar Bahadur Raja Singh, Advocate-General of the North-West Frontier Province, (Kanwal Kishore Raizada with him) instructed by B. Banerji — for Applicant.

Respondent in person.

Gwyer C. J. — We are not disposed to give leave to appeal in this case. The appellant has succeeded in establishing to our satisfaction the right of members of the Police force to certain statutory safeguards, the existence of which was denied by the North-West Frontier Province Government. We think that the Government should be content with the legal position as established by the judgment of this Court and should not seek to prolong the litigation. The case might be different if any fundamental principle of far-reaching importance had been involved in our decision, or if great administrative inconvenience was likely to arise from it; but that is not so, and the fact that the Government think that our decision was wrong is not itself a reason for granting leave to appeal. The application is dismissed.

G.N.

Application dismissed.

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